TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 314.

ISAAC GREENHOOD, FERDINAND BOHM, RICHARD O. HICKMAN, AND LEE M. COHN, PARTNERS DOING BUSINESS AS GREENHOOD, BOHM, AND COMPANY, AND T. B. WARFIELD, SHERIFF, PLAINTIFFS IN ERROR,

vs.

WILLIAM H. RANDALL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED SEPTEMBER 27, 1881.

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1 In the District Court, First Judicial District, Gallatin County, Montana Territory.

WILLIAM H. RANDALL, Plaintiff,
vs.
ISAAC GREENHOOD *et al.*, Defendants. } Bill of Ex., No. 2.

Be it remembered, that among the records and proceedings had and done in said cause were the following, to wit: The said plaintiff filed his complaint, which was in the words and figures following, to wit:

In the First Judicial District Court of the Territory of Montana, in and for the County of Gallatin.

WILLIAM H. RANDALL, Plaintiff,
vs.
ISAAC GREENHOOD, FERDINAND BOHM, RICHARD O. HICKMAN, AND LEE M. COHN, partners doing business as merchants in said Territory under the firm name and style of Greenhood, Bohm & Co., and T. B. Warfield, sheriff of Gallatin county, in said Territory, Defendants.

2 The plaintiff in the above-entitled action complains of the above named defendants, and for cause of complaint alleges:

That on the 10th day of May, A. D. 1878, at the county and Territory aforesaid, the said plaintiff was the owner of and in the possession of the following stock of goods and merchandise and personal property, fully set out in the inventory, marked Exhibit "A," and hereto attached and made a part of this complaint, and of the value of four thousand ($4,000) dollars.

That the above-named defendants, on or about the 14th day of May, A. D. 1878, at the county and Territory aforesaid, without the said plaintiff's consent, and wrongfully took said stock of goods, merchandise, and personal property from the possession of said plaintiff.

That before the commencement of this action, to wit, on the 15th day of May, A. D. 1878, the plaintiff demanded of defendants the possession of said stock of goods, merchandise, and personal property.

3 That said defendants still unlawfully and wrongfully withhold and detain said stock of goods, merchandise, and personal property from the possession of the said plaintiff, to the said plaintiff's damage in the sum of five thousand dollars.

Wherefore plaintiff demands judgment against the said defendants for the recovery of the possession of said personal property, stock of goods, and merchandise, or for the sum of four thousand dollars, the value thereof, in case delivery cannot be had.

2. For five thousand dollars damages for the said wrongful taking and detention thereof, and for costs of suit.

VIVION & PIERCE & EDWARDS,
Attorneys for Plaintiff.

TERRITORY OF MONTANA, } ss:
County of Gallatin, }

William H. Randall, being first duly sworn, says: That he is the plaintiff in the above-entitled action; that he has heard read the foregoing complaint, and knows the contents thereof; that the facts therein stated are true of his own knowledge, except as to those matters therein stated on information and bebelief, and as to those matters he believes they are true.

W. H. RANDALL.

Subscribed and sworn to before me, on this 1st day of October, A. D. 1878.

R. P. VIVION, *Notary Public.*

And on the 13th day of November, A. D. 1879, said defendants filed their demurrer to said complaint, which was in the words and figures following, to wit:

In the District Court, 1st Judicial District, Gallatin County, Montana Territory.

WILLIAM H. RANDALL, Plaintiff,
vs.
ISAAC GREENHOOD *et al.*, Defendants.

Now comes the defendants, Thomas B. Warfield, and demurs to the complaint of the plaintiff herein, and for cause shows unto the court here the following, to wit:

1st. That said complaint is uncertain, in that it shows no concert of action between said defendants.

2. There is a misjoinder of parties defendant.

3. Said complaint is in other respects informal, uncertain, and insufficient in law.

E. W. TOOLE,
Attorney for Defendants.

And said demurrer, coming on to be heard, was overruled by the court; to which ruling of the court in overruling said demurrer the defendants then and there duly excepted.

And on the 13th day of November, A. D. 1879, said defendants filed their answer herein to said plaintiff's complaint, which said answer was in the words and figures following, to wit:

In the District Court, First Judicial District, Gallatin County, Montana Territory.

WILLIAM H. RANDALL, Plaintiff,
vs.
ISAAC GREENHOOD *et al.*, Defendants.

Now come the defendants in the above-entitled action, and for answer to the complaint of the plaintiff therein deny that

6 at the date mentioned in said complaint, or at any time, said plaintiff was or now is the owner of the property described in said complaint and the exhibit thereto attached, or any part thereof, or was in the possession thereof, or any part thereof. Deny that at the dates mentioned in said complaint, or at any other time, they or either of them ever, wrongfully or otherwise, took said property or any part thereof from the possession of said plaintiff.

Deny that they, or either of them, or any of them, now or at any other time, wrongfully or unlawfully withheld or detained said property, or any part thereof, from said plaintiff, or that he has been damaged in the sum of five thousand dollars, or any other sum, or that said property was of greater value than fifteen hundred dollars.

And said defendants, for further answer and defence herein, show unto this honorable court, that heretofore, to wit, on the 14th day of May, A. D. 1878, the said Isaac Greenhood, Ferdinand Bohm, Richard O. Hickman, and Lee M. Cohn instituted an action
7 against one Madison M. Black and Zadock H. Daniels for the recovery of the sum of six hundred and twenty-two dollars and twenty-two cents, besides interest, upon an express contract for the payment of money. That in aid of said action, and for the security of any judgment they might recover therein, the said defendants in said action filed their affidavit and undertaking for an attachment therein, and on the day and year last aforesaid an attachment in due form was issued in said action, and delivered to the sheriff of the said county of Gallatin, and Territory of Montana, whereby said sheriff was directed to attach a sufficient amount of the goods, chattels, and personal and real property of the said defendants in said action to satisfy said plaintiff's said claim, with the costs and disbursements in that behalf expended; that in pursuance thereof the said sheriff did levy upon, seize, and attach certain goods, wares, and merchandise, then the property and in the possession of the said defendants in said action, as will appear by said sheriff's [—] to said writ, which was and is of the value of $1,500, and no more,
8 and which was all of the goods and property taken, and all the value of the same, which constitutes, as defendants are informed and believe, the wrongs and grievances set forth in said plaintiff's complaint herein.

That afterwards such proceedings were had and done in said action that on the 29th day of October, A. D. 1878, judgment was duly rendered and entered in favor of said plaintiffs and against said defendants for the sum of eighteen hundred and thirty-six dollars and ninety-eight cents for their debt, and ——— dollars costs, all of which said proceedings were had and done in the district court of the first judicial district in and for the county of Gallatin and Territory of Montana, and that said judgment is wholly unsatisfied and in full force and effect.

That during all the time aforesaid the said plaintiffs were and now are creditors of the said defendants in said action. That on or about the 1st day of May, A. D. 1878, at the city of Bozeman, at the

county and Territory aforesaid, the said Black and Daniels and the said plaintiff herein did fraudulently pretend to sell and did fraudulently transfer and assign the property so attached as aforesaid to the plaintiff herein, and did fraudulently pretend to deliver
9 the same to him, all of which was done with the intent and for the purpose of hindering and delaying and defrauding the said Isaac Greenhood, Ferdinand Bohm, Richard O. Hickman, and Lee M. Cohn and other creditors of the said Black and Daniels, by reason whereof the said pretended sale, transfer, and delivery was and is fraudulent and void.

Defendants further show unto this honorable court that the said pretended sale and transfer of said property was not followed by an immediate and actual and continued change of possession of the said property from the said Black and Daniels to the plaintiff herein, as required by the statute in such case made and provided, and that on account thereof the same was and is fraudulent and void as matter of law against the aforesaid and all other creditors of the said Black and Daniels.

Wherefore defendants ask judgment for their costs and disbursements in this behalf expended.

E. W. TOOLE,
Att'y for Defendants.

10 TERRITORY OF MONTANA, }
County of Gallatin, } *ss:*

Ike Greenhood makes oath and says that he is one of the defendants herein; that he has heard read the foregoing answer, and knows the contents thereof, and that the facts therein stated are true of his own knowledge, except as to such matters as are therein stated on information and belief, and as to those matters he believes it to be true.

IKE GREENHOOD.

Subscribed and sworn to before me, this 27th day of March, A. D. 1879.

[NOTARIAL SEAL.] JOSEPH K. TOOLE,
Notary Public.

And on the twenty-first day of November, A. D. 1879, plaintiff filed his replication herein, which was in the words and figures following, to wit:

11 In the District Court of the 1st Judicial District of Montana Territory, in and for the County of Gallatin.

WILLIAM H. RANDALL, Plaintiff,
vs.
ISAAC GREENHOOD *et al.*, Defendants.

Replication.

Now comes the said plaintiff and for amended replication to defendants' answer herein:

Denies that in pursuance of a writ of attachment issued from the office of the clerk of this court, on the 14th day of May, A. D. 1878, in an action wherein Isaac Greenhood, Ferdinand Bohm, Richard O. Hickman, and Lee M. Cohn were plaintiffs and one Madison M. Black and Zadock H. Daniels were defendants, the sheriff of said county and Territory did levy upon, seize, or attach certain goods, wares, or merchandise, then the property of or in the possession of said defendants in said action.

Denies that the judgment mentioned in defendants' answer is wholly unsatisfied.

Denies that on or about the 1st day of May, A. D. 1878, at the city of Bozeman, in the county and Territory aforesaid, the said Black and Daniels and this plaintiff did fraudulently pre-
12 tend to sell, or did fraudulently transfer or assign the property so attached, as aforesaid, to this plaintiff, or at any other time or place did said Black and said Daniels fraudulently sell, assign, or transfer said property to this plaintiff.

Denies that said Black and Daniels did fraudulently pretend to deliver the property so attached, as aforesaid, to this plaintiff with the intention or purpose of hindering, delaying, or defrauding the said Isaac Greenhood, Ferdinand Bohm, Richard O. Hickman, and Lee M. Cohn, or other creditors of the said Black and Daniels, and state the facts to be that said sale was *bona fide* and in good faith, and that the delivery of the said goods and merchandise was open and actual, immediately following the sale thereof, and remained in the possession of plaintiff until taken from his possession by said defendants.

Denies that said alleged pretended sale, transfer, and delivery was or is fraudulent or void.

Denies that said alleged pretended sale and transfer of said attached property was not followed by an immediate or actual
13 or continued change of possession of said property from the said Black and Daniels to the plaintiff herein.

Denies that said alleged pretended sale and transfer of said property was or is fraudulent or void, as a matter of law, against the aforesaid or any other creditors of said Black and Daniels.

Plaintiff, having fully replied to defendants' answer herein, prays for judgment in accordance with the prayer of his complaint herein.

TH. R. EDWARDS AND VIVION AND PIERCE,
Attorneys for Plaintiff.

TERRITORY OF MONTANA, }
County of Gallatin, } *ss.:*

William H. Randall, being first duly sworn herein, says that he is the plaintiff in the above-entitled action; that he has heard read the foregoing replication, and knows the contents thereof; that the matters and facts, as therein stated, are true of his own knowledge.

W. H. RANDALL.

Subscribed and sworn to before me, this 15th day of November, A. D. 1879.

[SEAL.] A. D. McPHERSON,
Probate Judge.

14 And said defendants, on the 5th day of May, A. D. 1880, filed their motion for judgment on the pleadings, which said motion was in the words and figures following, to wit:

In the District Court of the 1st Judicial District of Montana Territory in and for the County of Gallatin.

WILLIAM H. RANDALL, Plaintiff,
vs.
ISAAC GREENHOOD *et al.*, Defendants.

Motion.

Now come the defendants and move the court for judgment on the pleadings herein, and for cause show unto the court here that one of the grounds constituting the alleged fraud and the facts constituting the same is not denied, to wit:

That the pretended sale and transfer of said property was not accompanied by an immediate delivery and actual and continued change of possession.

WORD & E. W. & J. K. TOOLE,
Att'ys for Defendants.

15 And said motion coming on to be heard, the same was overruled, to which the defendants excepted, and during the trial of said cause, said defendants, by leave of the court first had, amended their answer, denying the value of the goods mentioned in the complaint by inserting the same, as follows: "Which was and is of the value of $1,500.00 and no more, and which was all the goods and property taken, and all the value of the same." Whereupon plaintiff asked orally, in open court, to amend his said replication in respect to the alleged defect specified in said motion for judgment, which was allowed by inserting said amendment on the margin of said replication, which was in words and figures following, to wit: "And state the facts to be that said sale was *bona fide* and in good faith, and that the delivery of said goods and merchandise was open and actual, and immediately followed the sale thereof, and remained in the possession of plaintiff until taken from his possession by said defendants," to which ruling and allowance the defendants objected, which was overruled by the court, and to which defendants duly excepted.

16 (Bill of exceptions, numbered one (1), to be inserted here, but the same cannot be found.

AMIE J. MALIN,
Deputy Clerk.)

And the said cause, coming on for trial, a jury was duly impanneled and sworn, and during progress of the trial the plaintiff, being a witness upon the stand, to support the issues on his part, was interrogated by his counsel, to wit: Plaintiff, in reply to interrogatories of his counsel, testified as follows, to wit: "I was the owner of the goods mentioned in Exhibit 'A,' attached to the complaint in this action on the 4th day of May, 1878. I purchased of Messrs. Black and Daniels all the goods, wares, and merchandise they then had in their store-room and warehouse in Bozeman, including their books, book accounts, excepting the personal accounts of said Black and Daniels, and one L. M. Black, all notes, due bills, and bills receivable; also, eighty-four head of work-cattle and twelve wagons, and all appurtenances belonging to said cattle and
17 wagons as a freighting train, and five head of horses belonging to it. I paid said Black and Daniels therefor the sum of fifteen thousand dollars.

A few days previous to this purchase I had, as the clerk of Black and Daniels, made an inventory of the goods and stock belonging to them, and estimated the value of the same at five thousand dollars. I was acquainted with the books and accounts and notes due them, and estimated their value at four thousand dollars. I was thoroughly acquainted with the bull train, and estimated its value at six thousand dollars; these several accounts were agreed upon between Black and Daniels and myself as the purchase sums; they gave me a bill of sale for said property.

For and in consideration of the sum of fifteen thousand dollars to us paid by William H. Randall, we have this day granted, bargained, sold, and delivered to said William H. Randall the following described personal property, viz.: All the goods, wares, and merchandise, including stock of every character, now in the store or sales-room and warehouse occupied by us, and situated on the
18 northeast corner of Main and Black streets, in Bozeman, Gallatin county, and Montana Territory, together with all the books, book accounts, (except the book accounts of L. M. Black, M. M. Black, and Z. H. Daniels,) bills receivable, notes, due-bills, stoves, lamps, and all other fixtures belonging to us in said sales-room. Also eighty-four (84) head of work cattle and twelve (12) wagons and all appurtenances belonging to said cattle and wagons as a freighting train, and which are now at or near Stillwater, on the Yellowstone river, in Gallatin county and Montana Territory, and 5 head of horses.

Dated this 4th day of May, A. D. 1878.

BLACK & DANIELS.

Witnessess:

TH. R. EDWARDS.
DAVID BOERUM.

Black and Daniels were owing me $770; this amount was deducted from the purchase sum, and I gave them my note for the balance; that is, the sum of $14,230.

$14,230. BOZEMAN, MONT., *May 4th*, 1878.

One day after date, for value received, I promise to pay to the order of Black & Daniels the sum of fourteen thousand two
19 hundred and thirty dollars.

W. H. RANDALL, JR.

Received on the within seven thousand ($7,000.00) dollars.
May 20th, 1878. BLACK & DANIELS.

They, Black & Daniels, then turned over to me all the goods and other property in Bozeman so purchased, and the next day Mr. Black, of said Black and Daniels, went with me to the Stillwater, on the Yellowstone, and turned over the said cattle and wagons and horses. When the goods and merchandise were turned over to me I received immediate possession of the same and continued in such possession until their seizure by the sheriff of this county, by virtue of a writ of attachment issued from the office of the clerk of the district court of said county, in an action wherein the defendants, Greenwood, Bohm, Hickman, and Cohn, were plaintiffs, and said Black & Daniels were defendants. I assisted the sheriff in making an inventory of the property belonging to me and attached by him in said action, and the list marked Exhibit "A" and attached to my complaint herein is copied from his
20 return on said writ of attachment. Soon after, about a week, I advertised that I would auction off said goods and merchandise. It was my intention to dispose of only unsalable goods and such as not fitted to my business. While in progress with such auction one Hammer, who was their agent, of defendants Greenhood, Bohm, Hickman, and Cohn, informed me that defendants, Greenhood, Bohm, Hickman, and Cohn, intended to attach my goods. I then said to him I have about $400.00 in my pocket. If you will go to Black & Daniels and get an order from them on me I will give you the $400.00, and you may stand behind the counter and receive the money coming in until said defendants, that is, Greenhood, Bohm, Hickman, and Cohn, are paid in full. This said Hammer, as such agent, declined to do. On the 14th day of May, 1879, said sheriff attached the said goods and took the goods mentioned in Exhibit "A," attached to the complaint, from my possession an sold them at sheriff's sale, on or about the 16th day of May, 1878; on the 12th day of May, 1878, I demanded of said
21 sheriff the return of said goods to me; they were never returned to me. The value of said goods so seized and sold by said sheriff was four thousand dollars, on the 20th day of May, 1878. I sold said bull train for $7,000.00, and paid the sum on my note to said Black & Daniels. I have since paid on said note about $2,600.00, for part of which I have receipts or vouchers, and for part have no vouchers.

There were no conditions of any character whatever to this sale and purchase. It was absolute and without reserve. Afterwards

I consented, at the request of Black & Daniels, to pay off their orders whenever I had money and without detriment to my business.

In what amount have you been damaged by reason of the wrongful detention of the property?

To which defendants objected, for the reason that no special damages were alleged, and none save nominal damages were recoverable.

Whereupon plaintiff withdrew his claim for damages, with the exception of nominal damages, which was made a part of the record in this case.

22 State whether or not you notified the defendants, or their agent, that you had purchased the property?

Objected to, as leading, as hearsay, as being declarations of plaintiff in his own behalf, and as only bearing on the question of willful damages, which is not claimed, if admissible at all, and as incompetent and inadmissible for any purpose, and misleading upon the question of possession, immediate delivery, and actual, open, and unequivocal possession.

I told Hammer, their agent, that I had bought the goods before they were attached.

State whether or not at the time of the sale and purchase between you and Black & Daniels you went into the immediate possession of the property and continued so.

Objected to, as leading, involving a question of law, and does not, as it should, require the statement of facts and acts showing what he did; which objection was overruled by the court, to which ruling defendants duly excepted.

Answer. I did.

Were not the heaviest and largest portion of your customers from the Yellowstone?

23 Objected to, as leading; as only applicable or admissible, if at all, on the question of damage to business or profits; is in support of no issue, is misleading and incompetent.

Which was overruled, and to which ruling the defendants excepted.

Answer. It was.

Z. H. DANIELS, one of plaintiff's vendors, being duly sworn, was interrogated by plaintiffs' counsel, and answered as follows, to wit:

I was a member of the late firm of Black & Daniels, on the 4th day of May, 1878; we sold all the goods, wares, and merchandise, including notes, due-bills, books, and book accounts, excepting those belonging to myself; the said Black, and one L. M. Black, and one bull train, consisting of 84 head of cattle, and 12 wagons and 5 horses, to the plaintiff. We valued the goods and merchan-

dise at $5,000; notes, books, &c., at $4,000; the bull train, at $6,000, and sold the same together to plaintiff for these sums. We were owing plaintiff $770; this amount was deducted, and
24 he gave his note for $14,270. He has since paid us on said note about $9,500. At one time he paid us $7,000, and the remainder at various times. At the time of the sale we gave plaintiff immediate possession of the property so sold, and the goods and merchandise remained in his possession until attached by the sheriff of this county The sale was absolute, and without conditions of any character. Afterwards, at our request, the plaintiff consented to pay our orders as fast as possible, without inconvenience to his business. I was well acquainted with the value of the goods mentioned in Exhibit "A," attached to the complaint of plaintiff, and they were worth at least $4,000 when attached by the sheriff.

State whether you notified Greenhood, Bohm & Co. and your other creditors of your intention to sell out.

Objected to, as leading, incompetent, misleading, which was overruled, and to which defendants excepted.

Answer. I did notify Greenhood in New York city that I would sell out; this was in the spring or summer of 1878.

25 And the said Daniels having testified in chief that he sold the goods of Black & Daniels to Randall; that he, Randall, gave his note for them to B. & D., defendants' counsel, on cross-examination, asked said witness as follows:

What was done with the note of Randall, after it was given to you?

Which was objected to, as not cross-examination; which was sustained by the court, said witness not permitted to answer, and to which defendants then and there duly excepted.

And plaintiff introduced M. M. Black, also one of his vendors, and interrogated him as follows:

I was a member of the late firm of Black & Daniels; know the goods mentioned in Exhibit "A," attached to plaintiff's complaint, on the 4th day of May, 1878; we sold to plaintiff all our goods and merchandise, notes, due bills, books, and accounts, (excepting our personal accounts and the one of L. M. Black,) and our bull train, consisting of 84 head of work cattle and 12 wagons and 5 head of horses; we sold to him for $15,000; we estimated the goods at $5,000; notes, due-bills, accounts, &c., at $4,000, and the bull
26 train at $6,000; we were owing plaintiff at the time of the sale $770; this amount was deducted from the purchase amount and plaintiff gave us his note for $14,230.

Plaintiff has since paid us about $9,500; on the 20th of May, 1878, he paid us $7,000, and the remainder at various times since; I knew the value of the goods mentioned in Exhibit "A," at the time they were attached by the sheriff and sold by him, and they were then worth $4,000; the said sale was absolute and without

conditions of any character; we immediately delivered the property so sold to plaintiff and he remained in possession of the same until the said goods were attached by the sheriff, some days after the sale; at our request plaintiff consented to accept our orders and pay same when without inconvenience to his business.

State whether or not any of the debts of Black & Daniels have been paid by Randall?

Objected to, for the reason that it is incompetent, leading, and misleading. Objection overruled, to which defendants excepted.

Answer. Yes.

27 C. L. CLARK, a witness for plaintiff, was interrogated in chief by plaintiff, as follows, to wit:

I am and was in May, 1878, an auctioneer; have lived in this territory, with the exception of two years, about 10 years; am somewhat acquainted with the value of goods, and just prior to the sale of said goods from Black & Daniels to plaintiff, I examined the same with a view of purchasing; I think and believe they were worth some $5,000, or more.

State in what way plaintiff advertised the auction sale.

Objected to, as incompetent, neither brought home to plaintiff, and as inadmissible for any purpose.

Which was overruled, and to which defendants excepted.

Answer. By handbills and notices; we sent some to parties in Virginia City, Helena, and Radersburg; this was five or six days after the sale to plaintiff.

Here plaintiff offered in evidence a handbill or poster, which was objected to, as inadmissible for any purpose, even if defendants knew of the same, which is not shown.

28 Which objection was overruled by the court, and to which ruling the defendants duly excepted.

Auction, auction. Great closing out sale of dry goods, groceries, clothing, hats, caps, boots, and shoes, hardware, etc., etc. I will sell at public sale all of the stock of goods of the late firm of Black & Daniels. Sale to commence Saturday, May 11, 1878, and continue from day to day until all goods are disposed of. Special sales every Saturday. Terms cash. Sale positive and without reserve.

W. H. RANDALL.

C. L. CLARK, *Auctioneer.*

(Times print.)

L. J. P. MORRILL, a witness on part of plaintiff, being interrogated by counsel, testified as follows:

I have been a merchant for 30 years past. Have resided in Montana some ten years. After the attachment of the property mentioned in Exhibit "A," attached to plaintiff's complaint, I had the

key to the room in which they were contained. I estimated their value at that time at fully $4,000.

29 And a certain notice of the sale of Black & Daniels to plaintiff, having been published in the "Avaunt Courier," of the 9th of May, 1878, after identifying the same by competent evidence, was offered in evidence in behalf of plaintiff-in-chief, to which defendants objected for the reason that it was incompetent to establish the *bona fides* of the sale or delivery of possession or change of the same, which were the issues in the case, and was incompetent for any purpose as against creditors of Black & Daniels and for the reasons before given; which objection was overruled by the court, and to which ruling of the court the defendants then and there duly excepted; and said notice was duly admitted as evidence in the cause, and which said notice was in the words and figures following, to wit:

"*Dissolution of Co-partnership.*

"The co-partnership existing between M. M. Black and Z. H. Daniels is this day dissolved. All persons indebted to them will settle their accounts with Wm. H. Randall at the old stand.

"M. M. BLACK.
"Z. H. DANIELS.

BOZEMAN, MONTANA, *May 4th*, 1878."

30 And M. W. Alderson having identified said notice, and being one of the proprietors of said newspaper was interrogated by plaintiff as follows:

Was Greenhood, Bohm & Co. subscribers to the "Avaunt Courier"?

To which defendants objected, for the reason heretofore given, and because it does not tend to establish the *bona fides* of the sale, or that immediate and continued possession of the property was had, or the value thereof, the duly issues joined herein, and that such evidence of notice if admissible at all, could only be so upon the subject of willful or special damage which is not alleged, is misleading, and tends to confuse the jury and divert their minds to incompetent matter; which was overruled, and said witness answered accordingly that "they were."

Whereupon the plaintiff requested of the clerk of this court, the writ of attachment and the sheriff's return thereon in an action commenced in this said court on or about the 14th day of May, 1878, wherein said defendants, Greenhood, Bohm, Hickman, and Cohn, were plaintiffs, and said Black & Daniels were defendants, for the purpose of showing the jury that the sheriff of this said

31 county on said 14th day of May, 1878, at the request and instance of said defendants, Greenhood, Bohm, Hickman, and Cohn, had in said above-mentioned action attached the goods of plaintiff mentioned in Exhibit "A," attached to complaint of the plaintiff herein, as the said property of said Black & Daniels, and

the said clerk then informed the court that after diligent search said writ of attachment, nor any of the papers in said action could be found.

Thereupon counsel for defendants admitted that the property mentioned in list marked Exhibit "A," and attached to plaintiff's complaint herein had been attached by said sheriff in said action wherein said Greenhood, Bohm, Hickman, and Cohn, were plaintiffs, and said Black & Daniels were defendants, as the property of said Black & Daniels, and that after judgment was obtained in said action, the said property had, on or about the 16th day of December, 1878, been sold by the sheriff of said county by virtue of a writ of execution issued from the office of the clerk of said court in said action. And it having been shown that plaintiff was selling off the said goods at auction for cash, withdrawing the same from
32 such auction when, in plaintiff's opinion, the prices bid for the same were too low.

Said defendants offered in evidence the sheriff's entry of sales at auction of said goods, showing prices of sales thereof, with statement that they would also connect it by evidence tending to show that there were no change in prices between the date of said plaintiff's auction sale and the said sale of said sheriff; which, after being identified, was objected to by plaintiffs, for the reasons that prices obtained for goods at sheriff's sale is no evidence of the value of goods. Said objection was sustained, and said evidence excluded, to which defendants excepted.

And said defendants, after the said witness Clark, plaintiff's auctioneer, had testified in chief that he had been employed by and was selling the goods off at auction for the plaintiff, and that the plaintiff was in possession under his purchase as affecting the *bona fides* of the sale, at the time they were attached while so being sold, and that he valued them at about $4,500, asked said Clark the following question on cross-examination:

33 What prices were said goods bringing with respect to the respect to the value of the value of the same? Which was objected to by plaintiff, for the reason that the price at auction was no criterion by which the value of said goods could be established; which objection was sustained by the court, and the said witness not permitted to answer; to which order, sustaining said objection, the defendants then and there duly excepted.

And evidence having been introduced to show that said plaintiff had been clerking for Black and Daniels since they had commenced business, and was so clerking at the time of the sale to him, in their place of business; that their sign was up, as it had been theretofore when the attachment was levied; and that their said sign, Black & Daniels, was on the curtains of the windows of said building, and that the plaintiff was carrying on business in said building, and that the goods levied upon were still in the same at the time of the levy.

And there was also evidence tending to show that said arrangement and agreement was made after the sale and before the levy
34 of the attachment thereon, and that he did so pay their said orders to the amount of twenty-six hundred dollars.

Thereupon plaintiff rested his cause in chief, and the said defendant, Greenhood, being sworn on behalf of defendants, in response to interrogatories, testified as follows:

I saw in the "Avaunt Courier," of issue of May 9, 1878, that Black & Daniels had sold their goods to the plaintiff.

Dissolution of Co-partnership.

The co-partnership existing between M. M. Black and Z. H. Daniels is this day dissolved. All persons indebted to them will settle their accounts with Wm. H. Randall at the old stand.

M. M. BLACK.
Z. H. DANIELS.

BOZEMAN, MONTANA, *May 4th*, 1878.

And immediately sent Mr. Hammer over here for the purpose of securing our claim against Black & Daniels.

And after this evidence was closed the following instructions were given by the court on its own motion, and the following instructions given and refused, which were offered by plaintiff, and
35 the following instructions were offered by defendants and given and modified and refused, to wit:

TERRITORY OF MONTANA, } ss:
County of Gallatin, }

In District Court, May Term, A. D. 1880.

WILLIAM H. RANDALL *vs.* ISAAC GREENHOOD *et al.*

The court instructs the jury that this is a suit to recover the possession of certain goods and chattels from the possession of the defendants, or the value thereof in money, for the wrongful taking and detention of said goods and chattels by the defendants from the plaintiff.

2. The plaintiff Randall claims to be the rightful owner and possessor of the goods claimed in this suit by purchase and delivery from Black & Daniels for a valuable consideration; that the terms of said contract are specifically set forth in writing; that payment therefor was made by the plaintiff to Black & Daniels for
36 the goods and chattels so purchased from said Black & Daniels, by giving them his promissory note.

3. The defendant's claim that such sale, or pretended sale, was as to them, fraudulent and void, on the ground that defendants were the creditors of Black & Daniels at the time and previous to such sale from Black & Daniels to the plaintiff Randall.

4. The court instructs the jury that the law in regard to sales of

this character is that, every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by the immediate delivery, and be followed by an actual and continued change of possession of the things sold and assigned shall be conclusive evidence of fraud as against the creditors of the vendor or the person making such assignment.

5. The court construes the law for the jury. The delivery must be made of the property; the purchaser must take the ac-
37 tual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendees; it must be such as to give evidence to the world of the claims of the new owner. He must, in other words, in the usual relation to the property, which owners of goods occupy in their property. This posession must be continuous, not aken to be sur rendered back again; not formal, but substantial.

6. Every conveyance or assignment in writing or otherwise, of goods or chattels, made with intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, debts, forfeiture, or demands, and any bond or other evidenee of debt given with the like intent as against the person hindered, delayed, or defrauded shall be void.

7. The question of fraudulent intent in all cases is a question of fact, and not of law, and is for the jury in this case to de-
38 termine from the preponderance of the evidence in this cause. But no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration.

8. The court instructs the jury that, in coming to the determination of the question of fraud, or fraudulent conveyance by Black & Daniels to Randall, the jury should take into consideration all the facts as to the sale and transfer, the manner of the plaintiff in making the purchase, of selling off the goods, of transferring the property mentioned in the bill of sale to other parties, pains taken to give the public notice of the sale, and from all the facts and circumstances you will make up your verdict.

9, You are the exclusive judges of the credibility of the witnesses, and should take into consideration the interest they each may have in this cause, their appearance and manner of testifying on the stand.

39 10. The court instructs the jury: The question of fraudulent intent in all cases and in this case shall not be construed by the jury in any manner to affect or impair the title of a purchaser, for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

11. The court instructs the jury: That, if from the preponderance of the evidence, and guided by the law as laid down to you by

the court, you should find as a fact fraud in the sale and transfer of the goods so sold as aforesaid, your verdict will be, "We, the jury, find for the defendants."

12. But if, from the preponderance of the evidence, and guided by the law as laid down to you by the court in this case, you should find as a fact that no fraud entered into this sale and transfer of the goods and chattels sold by Black & Daniels to the plaintiff Randall, as mentioned in said bill of sale, you will find for the
40 plaintiff; and if you do so find, you will further find and express in your verdict the value of the goods at the time of the levy of the writ of attachment by the sheriff, and add thereto 10 per cent. interest on that amount from the time of levy to the trial, and the whole amount so found will be the true measure of damages, you will find for the plaintiff.

13. In this cause the plaintiff makes no claim for special or punitive damages, and the jury will not consider in any manner or find any special damages other than the value of the goods and interest mentioned.

41 WILLIAM H. RANDALL, Plaintiff,
vs.
IKE GREENHOOD *et al.*, Defendants.

The court is asked to instruct the jury on the part of the plaintiff, as follows:

1st. The plaintiff must establish the material allegations of his complaint by a preponderence of the evidence. (Given.)

2. If you are satisfied by the evidence that the firm of Black & Daniels, consisting of M. M. Black and Z. H. Daniels, sold to the plaintiff, for a valuable consideration, the goods and chattels described in the complaint, and immediately thereafter delivered the same to the plaintiff; and that the plaintiff thereafter continued to use and enjoy the same as his own property, you must find that such a sale was valid and not contrary to the statutes of this territory.

3. In order to complete a possessian of said goods and chattels in plaintiff, you must be satisfied by the evidence that the
42 plaintiff actually took the same into his possession at the time of the sale and purchase with the intention of using the same as his own property, and actual possession exists when the goods are in the immediate occupancy of the party.

4. And the jury are instructed that a sale is an agreement by which one of the two contracting parties, called the seller or vendor, gives goods and passes title to them in exchange for a certain price to the other party, who is the buyer, or purchaser, and agrees to pay the price, and if you are satisfied from the evidence that plaintiff paid to said firm of Black & Daniels the price agreed upon by the contracting parties; and that such payment was made either in money or by promissory note, and in the manner agreed upon,

and by the parties at the time of the sale and purchase, you must find that the plaintiff paid for said goods a valuable consideration.

5. If the defendants had actual notice of the sale of said goods by the firm of Black & Daniels to the plaintiff, the fact that
43 there was no change in the sign or curtains formerly used by Black & Daniels in the store where said goods were attached by the plaintiff and the sheriff of Gallatin county, cannot be deemed evidence that plaintiff did not possess said goods as against any claim of defendants in their action against said firm.

6. If you are satisfied by the evidence that the defendants levied upon and took possession of said goods and chattels and thereafter deprived plaintiff of the same, and that said plaintiff was then the owner thereof and entitled to the possession of said goods, you must find for plaintiff, and so finding you are entitled to find the value of said goods at the time defendants so levied upon them, and the interest on said amount at the rate of ten per cent. per annum from that time up to the time of trial of this action.

7. The burden of proof, that the sale of said goods and chattels by said Black & Daniels to this plaintiff was fraudulent devolves upon the defendants. Fraud cannot be inferred or presumed, but must be proved to the satisfaction of the jury by the party pleading it.

44 8. If you are satisfied by the evidence that said Black & Daniels, or either of them, sold said goods to said plaintiff for a valuable consideration, and with intent, to hinder and delay their creditors or the defendants in this cause, but that the plaintiff had no knowledge of such fraudulent intent and design of said Black & Daniels at the time or prior to the time of the sale and purchase, the title of the plaintiff to said goods and chattels cannot be impaired or attacked by defendants by reason of their action against said Black & Daniels.

9. The possession of a third person of the property in question at the time of the attachment is notice to the defendants sufficient to put them on inquiry of the title the person in possession holds to the same.

In the District Court, 1st Judicial District, Gallatin County, Montana Territory.

WILLIAM H. RANDALL, Plaintiff,

vs.

ISAAC GREENHOOD *et al.*, Defendants.

Instructions for Defendants.

45 1st. Unless you believe from the evidence that there was such an open, notorious, and actual change of possession of the property in controversy, that the patrons and customers of Black & Daniels, and persons acquainted with their former manner of conducting and carrying on business could observe such change of possession at the time of the levy, you will find for the defendants.

2. In considering this open, actual, possession necessary to support the plaintiff's action, it must obviously and manifestly appear from the change in the condition and appearance of the premises and persons conducting the same, that the said Black & Daniels were no longer the owners of said property, but that they had disposed of the same, and were no longer in possession thereof.

3. If you believe from the evidence that plaintiff up to the time of the levying of the attachment herein, or at the time of the sale claimed to be made by Black and Daniels to plaintiff, was acting as clerk or agent of said Black & Daniels in and about carrying
46 on their business, and that at the time of such levy he was jointly in possession of said property with said Black & Daniels, or either of them; and that the usual sign of Black & Daniels still being over the front door of the store, containing said property, and it would appear from all the surroundings in connection with the previous condition of things that Black & Daniels were still the owners of said property, then it can make no difference whether said sale was made in good faith between the parties, it is void as to creditors, and you will find for the defendants.

4. The judgment pleaded by defendants conclusively establishes that they are creditors, and if the condition of affairs exist that are mentioned in the foregoing instructions, it can make no difference that a sale of the said property was taking place at auction, by an auctioneer, or that notice may have been given in the newspapers of the sale claimed to have been made, if the actual and visible change of possession had not taken place at the time the auctioneer commenced selling the property, and the levying of the at-
47 tachment, as suggested heretofore, the presumption would be that he was selling for the persons who, from the previous and present conditions of affairs appeared to be the owners of said property, and the selling thereof by such auctioneer, under such circumstances, could not affect any change of possession or defeat the rights of defendants as attaching creditors.

5. If there was even a *bona fide* sale made by Black & Daniels to plaintiff of the property in controversy, and it was not accompanied by such an immediate and continued change of possession, and actual possession as should from the very condition of things that such sale was made and such immediate and continued possession was had, such sale would be absolutely void and you will find for defendants.

6. If you believe, from the evidence, that the sale made by Black & Daniels to plaintiff was made with the intent to defraud, or to hinder or to delay the creditors of Black & Daniels, you will of course find for the defendants.

48 7. In considering whether or not the sale claimed to have been made was done either to hinder, delay, or defraud the creditors of Black & Daniels, you may consider the amount of property sold, the relation existing between the said parties, the financial condition of the plaintiff at the time, the terms of the alleged sale,

the means, if any, provided for the payment, the manner in which the goods were being sold, the knowledge Black & Daniels had thereof, the prices they were bringing compared with the price for which they were claimed to have been sold, whether invoiced or value guessed at in the sale, for what purpose the sale was so being made, the note or notes, if any, that were executed therefor, in whose possession it or they were, the object in placing it or them there, what other property was sold or claimed to be sold with said goods, whether it was turned back to said Black & Daniels or either of them, and all the other facts and circumstances surrounding the sale or alleged sale; and if you believe therefrom, and from all the testimony in the case, that the sale was made to hin-
49 der, delay, or defraud the creditors of said Black & Daniels, you will find for the defendants.

8. If the condition of affairs were such (and the said plaintiff was apprised thereof from the books of said Black & Daniels or otherwise) as to lead a reasonable person to believe that it was the intention of Black & Daniels to hinder, delay, or defraud their creditors, and such was their intention, and plaintiff purchased under such circumstances, you will find, for defendants, and in considering whether said plaintiff, at the time of the purchase or alleged purchase, had reasonable cause to believe that the said Black & Daniels intended to *to* hinder or delay or defraud their creditors, you can consider the relations between the parties, their financial condition, his facilities for knowing it, and the actual consequences that would result from and follow said sale.

9. In case of actual fraud, all the artifices and ingenuity of the perpetrators are usually brought into requisition in covering up and concealing the same, so as to give it ostensibly the character-
50 istics of an honest transaction, and thereby enable the parties connected with it to testify to such actual facts connected with the transaction as would make it appear real and *bona fide*, when in truth and in fact it may be that it was intended either to hinder, delay, or defraud the creditors of some of the parties, and when a jury are satisfied that such is the fact, it is their duty to their fellowman as the only medium by which such dishonest practices can be reached, to unhesitatingly declare such transactions void against such creditors.

10. The answer sets up the attachment of the property and judgment finally rendered upon the indebtedness for which the attachment was made to secure, which is not denied. This leaves the only issues to be determined are whether there there was fraud in fact, which you will determine from the law given you by the court, and the facts produced in evidence. (Given.)

11. Unless it is shown to you by the evidence introduced in the case that defendants, Greenhood, Bohm & Co., ordered or
51 directed the sheriff to levy upon the goods in question, of course you cannot find judgment against them in this action.

12. In considering the question of fraud under the statutes of

this Territory, and you find that the sale was made and actually intended between the parties as such, and yet you find that there was an agreement at the time of the making of the bill of sale and not afterwards, that Black & Daniels were to control the proceeds of the sale of the goods in question upon orders issued by them. This would make the sale invalid as to creditors, and you will find for the defendants.

13. If there was a bill of sale of the property in question absolute on its face, and a private understanding or an agreement outside of it between the parties by which the vendors were to control the funds arising from the sale of the same, then such arrangement would constitute fraud in law, and is void as against the creditors of the vendors.

52 14. In considering the value of the goods or damages to plaintiff, you should consider the manner he was selling the same, how they were sold by the sheriff, the mode of estimating by the witnesses and the price the same actually sold for, and the character and quality of the goods, so as to ascertain the extent of plaintiff's injury, if injured at all.

SAMUEL WORD,
E. W. & J. K. TOOLE,
Att'ys for Defendants.

And the said defendants objected to the instructions as a whole as given by the court on its own motion, and upon the motion of plaintiff, for the reason that the same based the validity of the sale purely upon the *bona fides* thereof as between the parties, ignored the statutory fraud as to creditors, which involves no question of good faith as between the vendor in possession and purchase, and that for that the same tended to mislead the jury; which was overruled, said instructions read to the jury, and to which defendants then and there and at the time excepted.

53 And said defendants likewise object to the 7th instruction given by the court on its own motion, for the reason that the same is inapplicable to the case on trial; assumes that Black & Daniels, as against their creditors, could give the plaintiff their goods, which is not pleaded or proven; was misleading; which objection being overruled, defendants then and there excepted. And said defendants likewise objected to the 8th instruction given by the court, for that the same directs the jury that they may take into consideration the pains taken by them to give notice to the public of the sale, and does not limit it to fraud in law, but makes it equally applicable to the issues of fraud in fact, which is erroneous and misleading, and because pains taken in notifiying the public of a sale is no evidence of the good faith in the sale.

And said defendants excepted to the overruling of their objections, and the giving of said instruction.

And said defendants objected to the 12th instruction so
54 given by the court, for that it ignored the fraud in law

pleaded, and upon which evidence was introduced, limited the consideration of the jury to actual fraud entering into the sale itself, as mentioned in the bill of sale, directed the assessment of interest, when no foundation was made for the same in the pleadings, because said damages are not nominal, which was all, under any circumstances, that were recoverable, and because interest is not allowable under our statutes in this case under the pleadings, and is erroneous, misleading, and not in accordance with the law applicable to the case; which was overruled by the court, and to which defendants excepted.

And the said defendants having requested the court to give instructions, Nos. 1, 3, 4, 13, and 14, as offered by them, but the court, considering that the said instructions did not accurately and correctly state the law, refused to give the same, to which refusal defendants then and there duly excepted.

Defendants asked the court to instruct the jury as requested and expressed in instruction No. 11, so offered by said defend-
55 ants, and the court, not considering that said instruction correctly stated the law as applicable to this cause, refused to give the same, to which the defendants then and there duly excepted.

And the said defendants objected to the 3d instruction requested by the plaintiff, for that the same directs the jury that actual notice to defendants of the sale dispenses with the necessity of a delivery of possession, and renders the usual evidence thereof unnecessary of, and tells the jury in such case to disregard the signs of the vendors up and on the windows and used by them, even though then, at the time of the attachment, is the only instruction given upon the subject, utterly ignores the evidence upon which a fraud at law is established, and rendered inoperative this defence by reason of notice of a sale, which evidence was incompetent, said instruction erroneous and misleading; and the said objection was overruled by the court, and to which ruling and giving of said instructions the defendants then and there excepted.

Said defendants objected to the 7th instruction so re-
56 quested by plaintiff and given by the court, for that the same, after stating that the burden of proof of fraud rested on defendants, stated to the jury that it could not be inferred, when the statute makes it directly inferable from certain facts, and makes it inferable from circumstances, and because it misleads the jury and substantially requires positive evidence of actual and constructive fraud; and the court overruled said objection and gave said instruction, to which ruling and giving of said instruction said defendants then and there duly excepted.

And after being so charged by the judge of the first district, M. T., and hearing the argument of counsel, the jury returned into court the following verdict, to wit:

District Court, 1st Judicial District Court, Gallatin County, Montana Territory.

WILLIAM H. RANDALL }
vs. } Verdict.
ISAAC GREENHOOD *et al.* }

We, the jury, find for the plaintiff and the return of the
57 property mentioned in plaintiff's complaint to plaintiff; and in the event the same cannot be returned, we find for plaintiff and assess his damage at three ($3,000) thousand dollars, value of the goods so taken, and six ($600) hundred dollars interest thereon, from the time of levy to time of trial.

G. W. KRATTSER, *Foreman.*

And thereupon the following judgment was entered, to wit:

In the District Court of the First Judicial District of Montana Territory, in and for the county of Gallatin.

WILLIAM H. RANDALL,
against
ISAAC GREENHOOD, RICHARD O. HICKMAN, FERDINAND BOHM, and Lee M. Cohn, partners doing business as merchants in said Territory, under the firm name of and style of Greenhood,
58 Bohm & Co., and Thomas B. Warfield, sheriff of Gallatin county in said Territory of Montana.

Judgment.

Now comes the said plaintiff, by his attorneys, Th. R. Edwards and Vivian and Pierce, and the said defendants, by their attorneys, E. W. Toole and Samuel Word, and this cause having been called for trial, a jury of twelve qualified men are sworn to try the issues herein, and plaintiff having introduced some evidence, one of the jurors announced to the court that there is a member of his family severely ill, and asks that he may be excused, and the said parties to this action having, by their respective attorneys, consented that the trial of this cause may proceed with eleven jurors, the court thereupon excuses said juror from further attendance in this action, and orders that the trial proceed with the remaining eleven jurors, and the testimony having been presented to the jury, and the matters in issue having been argued by counsel, this said cause was submitted to the jury under the instructions of the court, and said jury having retired to deliberate, return to the court with
59 their verdict in words and figures following, to wit:

In District Court, First Judicial District, Gallatin County, Montana Territory.

WILLIAM H. RANDALL *vs.* ISAAC GREENHOOD *et al.*

Verdict.

We, the jury, find for the plaintiff and the return of the property

mentioned in plaintiff's complaint to plaintiff; and in the event the same cannot be returned, we find for the plaintiff and assess his damages at three thousand ($3,000) dollars, value of the goods so taken, and six ($600) hundred dollars interest thereon from the time of levy until time of trial.

G. W. KRATTSER, *Foreman.*

Wherefore, it is ordered, adjudged, and decreed by the court, that the said plaintiff do have and recover of and from said defendants the possession of the personal property mentioned in plaintiff's complaint, and the said plaintiff have a writ for the return and restitution of said property, and in default thereof, do have
60 and recover judgment of said defendants for the sum of three thousand ($3,000) dollars, the value of said property, as found by the jury, and the further sum of six hundred dollars, the interest thereon as stated in said verdict, and for the sum of $201\frac{15}{100}$ *dollars*, his costs herein, and that execution issue therefor.

Judgment rendered on the 12th day of May, 1880.

E. J. CONGER, *Judge.*

And afterwards, to wit, on the 15th day of May, A. D. 1880, the defendants filed their bill of exceptions in this said cause, which is as follows, to wit:

In the District Court, First Judicial District, Gallatin County, Montana Territory.

WILLIAM H. RANDALL, Plaintiff,
vs.
ISAAC GREENHOOD *et al.*, Defendants.

Bill of Exceptions. No. 2.

Be it remembered that among the records and proceedings
61 had and done in said cause were the following, to wit:

The said plaintiff filed his complaint herein, which was in words and figures as follows, to wit:

(Which see at page —, ante.)

And on the 13th day of November, A. D. 1879, the said defendants filed their demurrer to the said complaint, which was in the words and figures as follows, to wit:

(Which see at page —, ante.)

And said demurrer coming on to be heard before the court the same was overruled, to which ruling the said defendants duly excepted.

And on the 13th day of November, A. D. 1879, the said defendants filed their answer herein, which was in figures and words as follows, to wit:

(Which see at page —, ante.)

And on the 21st day of November, A. D. 1879, plaintiff filed his

replication herein, which was in the words and figures as follows, to wit:

(Which see at page —, ante.)

And the said defendants, on the 5th day of May, A. D. 1880, filed their motion for judgment on the pleadings, which said
62 motion was in the words and figures following, to wit:

(Which see at page —, ante.)

And said motion coming on to be heard before the court the same was overruled, to which said ruling the said defendants then and there and at the time duly excepted.

And during the trial of said cause the said defendants, by leave of the court first had and obtained, amended their answer, denying the value of the goods mentioned in the complaint.

(Which see at page —, ante.

Whereupon the said plaintiff asked orally in open court to amend his said replication, in respect to the alleged defect specified in said motion for judgment, which was allowed by the court by inserting said amendment on the margin of said replication, which said amendment to said replication was in the words and figures as follows, to wit:

(Which see at page —, ante.)

To which ruling and allowance defendants objected; which
63 was overruled by the court, and to which ruling the defendants then and there duly excepted.

(Which see at page —, ante.

And the said cause coming on for trial, a jury was duly impanneled and sworn, and during the progress of the trial the plaintiff, being a witness upon the stand to support the issues on his part, was interrogated by his counsel as follows, to wit:

(Which see at page —, ante.)

Z. H. Daniels, one of plaintiff's vendors, being duly sworn, was interrogated by the plaintiff's counsel as follows, to wit:

(Which see at page —, ante.)

Plaintiff introduced M. M. Black, one of the vendors, and interrogated him as follows:

(Which see at page —, ante.

C. L. Clark, a witness for plaintiff, was interrogated by plaintiff as follows, to wit:

(Which see at page —, ante.)

64 Here plaintiff offered in evidence a handbill or poster, which was objected to as inadmissible for any purpose, even if defendants knew of the same which is not shown, which objection was overruled by the court, and to which ruling the defendants then and there, and at the time duly excepted.

(Which see at page —, ante.

And a certain notice of the sale of Black and Daniels to the plaintiff having been published in the Avaunt Courier of the 9th of May, A. D. 1878, after being identified by competent evidence, was offered in evidence-in-chief by the plaintiff, to the introduction

of which in evidence the defendants objected, for the reason that it was incompetent to establish the *bona fides* of the sale or delivery of possession or change of the same, which were the issues in the case and was incompetent for any purpose as against creditors of Black and Daniels, and for the reasons before given; which objection was
65 overruled by the court, and to which ruling the defendants then and there duly excepted, and said notice was admitted in evidence, and which was as follows, to wit:

(Which see at page —, ante.)

And M. W. Alderson, having identified said notice, and being one of the proprietors of said newspaper, was interrogated by plaintiff as follows, to wit:

(Which see at page —, Ante.)

And it having been shown that the plaintiff was selling off the said goods at auction for cash, without reason, the said defendants offered in evidence the sheriff's entry of sales at auction of said goods, showing prices of sales thereof, with statement that they would also connect it by evidence tending to show that there was no change in prices between the date of said plaintiff's auction sale and the said sale of said sheriff, which, after being identified, was objected to by plaintiff; said objection was sustained by the court and the evidence excluded, to which the defendants then and there duly excepted.

66 And the said defendants, after the said witness, Clark, plaintiff's auctioneer, had testified in chief, that he had been employed by, and was selling the goods off at auction for the plaintiff, and that the plaintiff was in possession under his purchase, as affecting the *bona fide* of the sale, and value of the goods being sold in the market at the time they were attached while beiag so sold, and that he valued them at about $4,500.00, asked said Clark the following question on cross-examination: "What prices were said goods bringing with respect to the value of the same?" Which was objected to by plaintiff, for the reason that the price at auction was no criterion by which the value of said goods could be established; which objection was sustained by the court, and said witness was not permitted to answer, to which ruling the said defendants then and there duly excepted.

And evidence having been introduced tending to show that the said plaintiff had been clerking for Black & Daniels since
67 they had commenced business, and was so clerking at the time of the sale to him in their place of business, that their sign was up as it had been theretofore when the attachment was levied, and that their said sign of Black and Daniels was on the curtains of the windows of said building, and that he, plaintiff, was carrying on business in said building, and that the goods levied upon were still in the same at the time of the levy, and that there was evidence tending to show that at the time of the sale it was understood and agreed that said Black and Daniels should control

the proceeds of the sale of the goods made by plaintiff upon their orders therefor, which were to be paid by plaintiff.

And there was also evidence tending to show that said arrangement and agreement was made after the sale and before the levy of the attachment thereon, and that he did so pay their said orders to the amount of twenty-six hundred dollars.

68 That Daniels was rooming in the store, and was behind the counter or in the back room of the store changing linen at the time of the levy of the attachment.

And after this evidence was closed the following instructions were given by the court on its own motion, and the following instructions given and refused, which were offered by plaintiff, and the following instructions were offered by defendants, and given and modified, and given as modified, and refused, to wit:

(Here insert all of said instructions offered by both parties and those given by the court on its own motion as numbered, showing which were given, which refused, and which modified, and in what respect modified.)

(Which see at pages —, ante.)

And the said defendants objected to the instructions as a whole as given by the court on its own motion, and upon the motion of plaintiff.

(Which see at pages —, ante.)

69 And the said defendants having requested the court to give instructions Nos. 1, 3, 4, 13, and 14, as offered by them, but the court, considering that the said instructions did not accurately and correctly state the law, refused to give the same, to which refusal defendants then and there excepted. And there being no evidence before the jury tending to show that defendants, Greenhood, Bohm, Hickman, or Cohn, had directed the sheriff to levy upon the particular property in question, defendants asked the court to instruct the jury as requested and expressed in instruction No. 11, so offered by said defendants, and the court, not considering that said instruction correctly stated the law as applicable to this case, refused to give the same, to which refusal defendants then and there duly excepted.

And the said defendants objected to the third instruction requested by the plaintiff, for that the same directs the jury that actual notice to defendants of the sale dispenses with the necessity of a delivery of possession, and renders the actual evidence thereof unnecessary of and till the jury in such case to disregard the

70 signs of vendors which were up and on the windows, and used by them, even though then at the time of the attachment, is the only instruction given upon the subject; utterly ignores the evidence upon which a fraud at law is established and rendered inoperative. This defence by reason of notice of a sale, which evidence was incompetent, said instruction was erroneous and misleading; and the said objection was overruled by the court, to which ruling and the giving of the said instruction, defendants then and

there duly excepted. And defendants then and there duly excepted and objected to the 7th instruction so requested by the plaintiff and given by the court, for that the same, after stating that the burden of proof of fraud rested on defendants, stated to the jury that it could not be inferred when the statute makes it directly inferable from certain facts, and makes it inferable from circumstances, and because it misleads the jury, and substantially requires positive evidence of actual and constructive fraud; and the court overuled said objection and gave said instruction, to which ruling and
71 giving of said instruction said defendants then and there duly excepted. And after being so charged by the court, and hearing the argument of counsel, the jury returned into court the following verdict, to wit:

(Which see at page —, ante.)

And thereupon the following judgment was rendered herein, to wit:

(Which is at page —, ante.)

And the defendants bill of exceptions is signed, sealed, and made a part of the records herein.

E. J. CONGER,
Judge 1st Dist. M. T.

72 And afterwards, to wit, on the 8th day of June, A. D. 1880, the defendants herein filed in the office of the clerk of said district court, their notice of appeal to the supreme court of Territory of Montana, in said cause, of which said notice, in words and figures, the following is a copy, to wit:

In the District Court of the First Judical District of the Territory of Montana, in and for the County of Gallatin.

WILLIAM H. RANDALL, Plaintiff,
vs.
ISAAC GREENHOOD, FERDINAND BOHM, RICHARD O. HICKMAN, and LEE M. COHN, partners doing business under the firm name and style of Greenhood, Bohm & Co., and Thomas B. Warfield, sheriff of Gallatin county, M. T., Defendants.

Notice of Appeal.

Please take notice, that the defendants in the above-entitled action hereby appeal to the supreme court of said Territory from the judgment therein made and entered in the said district
73 court, on the 12th day of May, A. D. 1880, in favor of the plaintiff in said action and against said defendants, and from the whole thereof.

WILL. F. DAVIS,
Of Counsel for Defendants.

To the clerk of said district court, and to Wm. H. Randall, plaintiff, and to Vivion and Pierce and Thos. R. Edwards, attorneys for plaintiffs:

I hereby acknowledge service of copy of the foregoing notice of appeal, on this 8th day of June, A. D. 1880, at 10 o'clock a. m.

TH. R. EDWARDS,
Of Counsel for Plaintiff.

And afterwards, to wit, on the 8th day of June, A. D. 1880, the said defendants filed in the office of the clerk of said district court their undertaking on appeal, which is as follows, to wit:

In the District Court of the First Judicial District of the Territory of Montana, in and for the County of Gallatin.

WILLIAM H. RANDALL, Plaintiff,
vs.
74 ISAAC GREENHOOD, FERDINAND BOHM, RICHARD O. HICKMAN, and LEE M. COHN, partners doing business under the firm name and style of Greenhood, Bohm & Co., and Thomas B. Warfield, sheriff of Gallatin county, Montana Territory, Defendants.

Whereas the defendants in the above-entitled action desire to appeal to the supreme court of the Territory of Montana from a judgment made and entered against them in said action in the said district court, in favor of the plaintiff in said action, on the 12th day of May, A. D. 1880, for thirty-six hundred dollars damages, and two hundred and one dollars and fifteen cents costs of suit—

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, residents and householders of Gallatin county, Montana Territory, do hereby jointly and severally undertake and promise on the part of the appellants that the said appellants will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not ex-
75 ceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellants are desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof, and of the premises, jointly, and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of seventy-six hundred and six dollars and twenty cents, being double the amount named in said judgment, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellants shall pay plaintiff the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed, only in part, and all damages and costs which shall be awarded against the appellants upon the appeal herein.

Dated Bozeman, M. T., June 7, A. D. 1880.

LESTER S. WILSON. [SEAL.]
NATHAN E. DAVIS. [SEAL.]

TERRITORY OF MONTANA, } ss:
County of Gallatin, }

76 Lester S. Wilson and Nathan E. Davis, being first duly sworn, depose, and each for himself says, that he is worth the amount specified in the foregoing undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

LESTER S. WILSON.
NATHAN E. DAVIS.

Subscribed and sworn to before me, this June 8th, 1880.
AMIE J. MALIN, *Deputy Clerk.*

77 And afterwards the judge of said court and the plaintiff's attorneys, Ira H. Pierce and Th. R. Edwards, presented to the deputy clerk of said district court, in his office in Bozeman, the plaintiff's amendments to defendants' bill of exceptions in said cause, heretofore signed by said judge and filed by said defendants on the 15th day of May, A. D. 1880.

Whereupon the said judge of said court ordered that said deputy clerk, as aforesaid, file the said amendments, as aforesaid, of the same date of the defendants' bill of exceptions, as aforesaid, to wit, of May 15th, 1880, which said amendments were filed accordingly, and are as follows, to wit:

In the District Court of the First Judicial District in and for Gallatin County and Territory of Montana.

WILLIAM H. RANDALL, Plaintiff,
vs.
ISAAC GREENHOOD *et al.*, Defendants.

Plaintiff's Amendments to Defendants' Bill of Exceptions, marked "No. 2."

78 Amend by adding after the word "competent," in line 13, on page 2, of said bill of exceptions, the following: Thereupon defendants amended said complaint by interlining the same as follows:

(Which see at page ——, ante.)

Amend by inserting after words "to wit," in line ——, page ——, that the plaintiff, in reply to interrogatories of his counsel, testified as follows: I was the owner of the goods mentioned in Exhibit "A," attached to the complaint in this action, on the 4th day of May, 1880. I purchased of Messrs. Black & Daniels all the goods, wares, and merchandise they then had in their store-room and warehouse in Bozeman, including their books, book accounts—excepting the personal accounts of said Black & Daniels and one L. M. Black—all notes, due bills, and bills receivable; also eighty-four head of work cattle and twelve wagons, and all appurtenances belonging to said cattle and wagons as a freighting train, and five

head of horses belonging to it. I paid said Black & Daniels therefor the sum of fifteen thousand dollars. A few days previous
79 to this purchase I had, as clerk of said Black and Daniels, made an inventory of the goods and stock belonging to them, and estimated the value of the same at five thousand dollars. I was acquainted with the books and accounts and notes due them, and estimated their value at four thousand dollars. I was thoroughly acquainted with the "bull train," and estimated its value at six thousand dollars. These several accounts were agreed upon between Black and Daniels and myself as the purchase sums. They gave me a bill of sale for said property.

(Which see at page —, ante.)

Black & Daniels were owing me $770. This amount was deducted from the purchase sum, and I gave them my note for the balance; that is, the sum of $14,230.

(Which see at page —, ante.

They, Black & Daniels, then turned over to me all the goods and other property in Bozeman so purchased, and the next day Mr. Black, of said Black and Daniels, went with me to Stillwater,
80 on the Yellowstone, and turned over the said cattle and wagons and horses. When the goods and merchandise were turned over to me I received immediate possession of the same, and continued in such possession until their seizure by the sheriff of this couny, by virtue of a writ of attachment, issued from the office of the clerk of the district court of said county, in an action wherein the defendants, Greenhood, Bohm, Hickman, and Cohn, were plaintiffs, and said Black & Daniels were the defendants. I assisted the sheriff in making an inventory of the property belonging to me and attached by him in said actioa, and the list marked Exhibit "A," and attached to my complaint herein, is copied from his return on said writ of attachment. Soon after, about a week, I advertised that I would auction off said goods and merchandise. It was my intention to dispose of only unsalable goods such as were not fitted to my business. While in progress with such auction, one Hammer, who was the agent of defendants, Greenhood, Bohm, Hickman and Cohn, informed me that defendants, Green-
81 hood, Bohm, Hickman, and Cohn, intended to attach my goods. I then said to him, "I have about $400 in my pockets; if you will go to Black & Daniels and get an order from them on me I will give you the $400, and you may stand behind the counter and receive the money coming in until said defendants—that is, Greenhood, Bohm, Hickman, and Cohn—are paid in full. The said Hammer, as such agent, declined to do. On the 14th day of May, A. D. 1878, said sheriff attached said goods, and took the same as mentioned in Exhibit "A," attached to the complaint, from my possession and sold them at sheriff's sale on or about the 15th day of December, A. D. 1878. On the 15th day of May, 1878, I demanded of said sheriff the return of said goods to me. They were never returned to me. The value of the said goods so seized and

sold by said sheriff was four thousand dollars. On the 20th day of May, 1878, I sold said "bull train" for $7,000, and paid the sum on my note to said Black & Daniels. I have since paid on said note about $2,600, for part of which I have receipts or vouchers, and for part I have no vouchers. There were no conditions of any
82 character whatever to this sale and purchase. It was absolute and without reserve. Afterwards I consented, at the request of said Black & Daniels, to pay off their orders whenever I had money and without detriment to my business.

Amend by inserting after the words, "to wit," on line —, page —, the following: "I was a member of the late firm of Black & Daniels. On the 4th day of May, A. D. 1878, we sold all the goods, wares, and merchandise, including notes, due bills, books and book accounts, excepting those belonging to myself, the said Black, and one L. M. Black, and one bull train, consisting of 84 head of cattle and 12 wagons and 5 horses, to the plaintiff. We valued the goods and merchandise at $5,000.00, notes, books, &c., at $4,000.00, the bull train at $6,000.00, and sold the same together to plaintiff for these sums.

We were owing plaintiff $770.00. This amount was deducted, and he gave us his note for $14,270.00. He has paid us on said note about $9,500.00. At one time he paid us $7,000.00, and the remainder at various times. At the time of the sale we gave
83 plaintiff immediate possession of the property so sold, and the goods and merchandise remained in his possession until attached by the sheriff of this county. The sale was absolute and without conditions of any character. Afterwards, at our request, the plaintiff consented to pay our orders as fast as possible, without inconvenience to his business. I was well acquainted with the value of the goods mentioned in Exhibit "A," attached to the complaint of plaintiff, and they were worth at least $4,000.00 when attached by the sheriff."

Amend by inserting after the word "follows," on line —, page —, the following: "I was a member of the late firm of Black & Daniels. Knew the goods mentioned in Exhibit "A," attached to plaintiff's complaint. On the 4th day of May, A. D. 1878, we sold to plaintiff all our goods and merchandise, excepting our personal accounts and the one of L. M. Black, and our "bull train," consisting of 84 head of work cattle and 12 wagons and 5 head of horses. We sold to him for $15,000. We estimated the goods at $5,000.00, notes, due bills, accounts, &c., at $4,000.00, and the "bull train" at $6,000.00. We were owing plaintiff at the time of sale
84 $770.00. This amount was deducted from the purchase amount, and plaintiff gave us his note for $14,230.00. Plaintiff has since paid us about $9,500.00. On the 20th day of May, A. D. 1878, he paid us $7,000.00, and the remainder at various times since. I know the value of the goods mentioned in Exhibit "A" at the time they were attached by the sheriff and sold by him, and they were then worth $4,000.00. The said sale was absolute and

without conditions of any character. We immediately delivered the property so sold to plaintiff, and he remained in the possession of the same until the said goods were attached by the sheriff. Some few days after the sale, at our request, plaintiff consented to accept our orders and pay the same when without inconvenience to his business."

Amend by inserting after word "chief," in line —, page —, as follows: "I am and was, in May, A. D. 1878, an auctioneer; have lived in this Territory, with the exception of some two years, about 10 years; am somewhat acquainted with the value of goods, and just prior to the sale of said goods, from Black and Daniels
85 to the plaintiff, I examined the same with the view of purchasing. I think and believe they were worth some $5,000.00 or more."

Amend by inserting after the word "handbill," on page —, in line —, the following:

L. J. P. MORRILL, a witness on the part of the plaintiff, being interrogated by counsel, testified as follows:

"I have been a merchant for 30 years past; have resided in Montana some 10 years. After the attachment of the property, mentioned in Exhibit 'A,' attached to plaintiff's complaint, I had the key to the room in which they were contained, and for months daily saw said goods. I estimated their value at that time at fully $4,000.00."

Amend by inserting on line —, on page —, after the words "that they were," the following: Hereupon plaintiff requested of the clerk of this court the writ of attachment and the sheriff's return thereon, in action commenced in this said court on or about the 14th day of May, A. D. 1878, wherein said defendants, Greenhood, Bohm, Hickman, and Cohn, were the plaintiffs, and the
86 said Black and Daniels were the defendants, for the purpose of showing the jury that the sheriff of this said county, on said 14th day of May, 1878, at the request and instance of said defendants, Greenhood, Bohm, Hickman, and Cohn, had, in said above-mentioned action, attached the goods of the plaintiff mentioned in exhibit, marked "A," attached to the complaint of plaintiff herein as the said property of said Black and Daniels, and the said clerk informed the court that after diligent search said writ of attachment nor any of the said papers in said action could be found. Thereupon counsel for defendants admitted that the property mentioned in the list, marked Exhibit "A," and attached to plaintiff's complaint herein, had been attached by said sheriff in said action, wherein said Greenhood, Bohm, Hickman, and Cohn were the plaintiffs, and said Black and Daniels were the defendants, and that after judgment obtained in said action, the said property had, on or about the 16th day of December, A. D. 1878, been sold by the sheriff of said county by virtue of a writ of execution issued from the office of the clerk of said court in said action.

87 Amend by erasing the words "without reserve," in line —, page —, and inserting in lieu thereof the following: "Withdrawing the same from such auction when, in plaintiff's opinion, the prices bid for the same were too low."

Amend by inserting after the word "plaintiff," in line —, page —, the following: "For the reason that prices obtained for goods at sheriff's sale is no evidence of the value of goods."

Amend by striking out in lines —, and page —, the following words, viz.: "And value of the goods being sold in the market," for the reason that the testimony of said witness was not given as the value of goods at auction prices.

Amend by striking out the words "and that," on line —, page —, and all of lines ————, and the words, "be paid by plaintiff," in line —, on said page —, for the reason there was not evidence of that character.

88 Amend by striking out the words "that Daniels was," on line —, and all of lines ———, on page —, for the reason that there was no evidence of that character, and insert the following: "Thereupon plaintiff rested his case in chief, and the said Greenhood, being sworn, on behalf of defendants, in response to interrogatories, testified as follows: 'I saw in the Avaunt Courier, of the issue of May 9, 1878, that Black & Daniels had sold their goods to the plaintiff"—(here insert notice of such sale from said issue of said paper, ———, ————, which see at page —, ante,) —'and immediately sent Mr. Hammer over here for the purpose of settling or securing our claim against Black & Daniels.'"

Amend by striking out all of lines ————, and words "in question" on line —, on page —, for the reasons that hereinbefore these amendments show that plaintiff offered to introduce papers in said action of Greenhood, Bohm, Hickman, and Cohn against said Black & Daniels, showing these facts, and that counsel for defendants thereupon admitted the same. These amendments are allowed in full.

O. J. CONGER,
Judge 1st Judicial District, Montana Territory.

89 TERRITORY OF MONTANA, } *ss:*
County of Gallatin, }

I, Theo. Muffly, clerk of the district court of the first judicial district of the Territory of Montana, in and for the county of Gallatin, do hereby certify that the foregoing pages numbered from 1 to —, inclusive, contain a full, true, and correct transcript of certain of the pleadings, records, and proceedings filed, made, and had in said court, in the cause of William H. Randall against Isaac Greenhood, Ferdinand Bohm, Richard O. Hickman, L. M. Cohn, and Thomas B. Warfield.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Bozeman, on this July 26, 1880.

[SEAL.] THEO. MUFFLY, *Clerk.*
By AMIE J. MALIN, *Deputy Clerk.*

Filed in the office of the supreme court, August 9, 1880.
J. R. ALDEN, *Clerk.*

90 And afterwards, to wit, on the 11th day of August, A. D. 1880, came the respondent herein, and made suggestion of a diminution of the record in this cause, the same being in writing, the following is a copy, viz:

In the Supreme Court of the Territory of Montana. August Term, A. D. 1880.

WM. H. RANDALL *vs.* ISAAC GREENHOOD *et al.*

Suggestion of Dim'n of Record.

And now comes the plaintiff, by his attorneys, and suggests, and shows to the court: That the transcript of the record filed herein, is defective in that, to wit, that in the amendments of plaintiff to the bill of exceptions filed in the court below, certain portions of said bill of exceptions were stricken out by the judge who tried said cause; and that such portions so stricken out are not designated in said transcript except by lines and pages; that such portions of said bill of exceptions which were so stricken out remain in said transcript as made by the clerk of the court below, and
91 that said transcript is not a correct transcript of the record in said cause, as will fully appear by the said transcript. Wherefore plaintiff suggests to the court said diminution, and asks that the same may be supplied by the said clerk of the district court, and that he designate what portions were stricken out.

TH. R. EDWARDS,
VIVION & PIERCE,
CHUMASERO & CHADWICK,
SHOBER & LOWRY,
Pl'ff's Attorneys.

And afterwards, to wit, on the 13th day of August, A. D. 1880, this cause coming on to be heard upon respondent's motion to correct the record on file in this cause, after hearing counsel for the respective parties, the court overruled the said motion, and thereupon the court having inspected the said record, and also the original papers in this cause, and which were brought into this court for that purpose; and it appearing to the court thereupon and from said record that the bill of exceptions in this cause, and upon
92 which this case should be heard, is contained in said record on and including pages 1 to 62, down to the word "Conger," and that pages 74, 75, 76, 77, 78, and 92 of said transcript contain the notice of appeal, undertaking, and certificate of the clerk of

the district court, and that pages 62, after the word "Conger," and pages 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, and 73, and pages 79 to 91, inclusive, are improperly in such transcript, are surplusage and should be stricken out of said transcript. It is, therefore, ordered that page 62, after word "Conger," and pages 63 to 73, inclusive, and pages 79 to 91, inclusive, be stricken out from the said record.

And afterwards, to wit, on the 14th day of August, A. D. 1880, the said defendants and appellants filed herein their brief of points and authorities relied on *on* the appeal, in words and figures following, to wit:

93 In the Supreme Court of Montana Territory. August Term, A. D. 1880.

WILLIAM H. RANDALL, Pl'ff and Respondent,
vs.
ISAAC GREENHOOD *et al.*, Def'ts and Appellants. } No. 310.

Brief of the Appellants.

It will be seen from the record in this case that the appeal is from the judgment, and embracing a bill of exceptions duly signed by the court below, which forms a part of the judgment-roll, and not from an order refusing a new trial, or upon a statement of the case. Counsel seem to have treated the bill of exceptions as a statement, which, under the statute, should have been served upon them, and to which they had a right to file amendments. Proceeding upon this basis, amendments have been allowed in no respect changing the facts stated in the original bill of exceptions, but incorporating into it a large mass of the evidence that only serves to incumber the record, and should be stricken out. Upon the original bill of exceptions no motion for a new trial having been made, or
94 any attempt to state all the testimony the court would assume, as it will now do, that the evidence was amply sufficient to support the verdict. No question as to the sufficiency of the evidence is raised, or sought to be raised, by which reason these amendments are at all material.

Four legal propositions are alone presented:

1st. Was it error in the court below in permitting the amendment to the replication by inserting the same upon the margin thereof?

2d. Did the court err in excluding certain interrogatories propounded by appellant, and in not permitting the witnesses to answer the same?

3d. Did the court admit incompetent testimony on the part of the plaintiff to go to the jury under objections and exceptions of defendants? And,

4th. Did the court present the law of the case properly to the jury by the instructions given, or commit any error in refusing those which were refused?

5th. Nominal damages alone being claimed, was interest allowable as such without being specially pleaded?

95 Upon the first proposition appellant respectfully submits that one of the principal objects of the Code is to put the parties upon their oath in framing the issues to be tried by the court or jury. That by the permission given to interline a material denial in the replication without requiring a verification of the pleading thereafter, was error, in reference to which it cannot be said no injury occurred. The appellant had as much right to require the verification to this pleading, under the provisions of our statute, as he would to require the witnesses in support of those issues on the part of respondent to be sworn.

See Record, pages 14 and 15, and date of the verification, as shown by the jurat, page 13.

The errors assigned under the second head, found on pages 21 to 30, inclusive, disclose errors in the admission of incompetent interrogatories and incompetent evidence. Especially do we refer to the question of taking immediate, actual, and continued possession of the property. This was a mixed question of law and fact, partly for the court and partly for the jury. And yet the

96 witness was permitted to answer a leading question, whereby he was permitted to usurp the province of both.

See Record, page 21.

And also in not permitting appellants to inquire into what was done with the note executed for the goods. The whole evidence of the sale was gone into by the witness; the terms and conditions of it. The execution of the note for the property, to show the *bona fides* of the sale, and yet when appellant sought to show that the note in was never executed, but left in the hands of a third party for the protection of Randall, the fraudulent purchaser and maker. The court refuses to permit the inquiry or answer. The authorities are universal and unequivocal upon the proposition that if the interrogatory was proper, the court will not speculate as to what it may have finally elicited, or what effect it may have had upon the verdict. There is but one course to pursue in such case, and that is to reverse.

We refer to the forogoing as a few among the many fatal

97 errors assigned under the 2d and 3d head.

It will be seen from the admission sought to be established by the record, as amended on page 31, that in point of fact appellants only admitted the levy by the sheriff at the date mentioned. There is no admission in the pleadings whatever that appellants had anything to do in causing the levy, except in procuring the writ of attachment which directed the sheriff to levy on the property of Black & Daniels.

The instruction offered on this point was correct, and should have been given.

Again, it will be seen from the record, page 21, that appellants objected to the evidence of notice to them of the alleged sale as

affecting the question of fraud in law, growing out of the relations of the parties, and the question of actual change of possession. Evidence tending to show that there was none having gone to the jury, and which was competent and proper to be considered by them as affecting the question of actual change of possession. Yet it will be seen by instruction No. 5, at the request of re-
98 spondent, record page 43, that the court actually told the jury that if appellants had such notice they should disregard all this evidence. This is an error, so palpable and vital that a bare reference to it is all that is required to reverse this case. We call attention to all the many errors referred to in the record, and insist upon each of them, as they are too numerous to admit of special mention.

44 Cal., 246.
40 Cal., 246.
39 Cal., 609.
14 Cal., 460 to p. 492.

As to errors assigned on pages 31, 32 and 33, limiting respondents to the particular objection made.

E. W. & J. K. TOOLE,
Att'ys for Appellants,

And afterwards, to wit, on the 16th day of August, A. D. 1880, the respondent filed herein his brief, of which said brief, in words and figures, the following is a copy, to wit:

99 In the Supreme Court, Montana Territory. August Term, A. D. 1881.

WILLIAM H. RANDALL, Respondent,
vs.
ISAAC GREENHOOD *et al.*, Appellants.

Brief of Respondent.

1. This court has determined that this case is for hearing upon the bill of exceptions as settled and determined by the court below. There is no question as to the sufficiency of the evidence to sustain the verdict. The only question is: Is there any error apparent in the bill of exceptions affecting the substantial rights of the appellants as amended and settled by the court below?

1st. The record shows in this case that the complaint of plaintiffs was filed in October, 1878. Defendants' demurrer was filed November 13, 1879, which was overruled, and on the 13th of November, 1879, defendants filed their answer, and on Nov. 21st
100 plaintiff filed replication to answer.

On the 5th day of May, 1880, defendants filed a motion for judgment, which motion was overruled.

See Record, page 14.

And on the same day the case came on for trial; that during the

progress of the trial defendants asked and obtained leave to amend their answer, and simultaneously the plaintiff asked and obtained leave to amend his replication, which was granted by the court; that neither of said amendments, nor the answer nor replication as amended were verified by the respective parties, and no exception was taken by either party on the question of verification, the only objection being to the allowance of plaintiff's amendment, but no objection was made to the want of verification to plaintiff's amendment to replication, hence the same was thereby waived. Said amendment in particular affected the substantial rights of the parties.

See amendment to replication.

2. As to permitting a party to ask a leading question, it
101 is in the discretion of the court and is not ground for reversal. The question is: Was any improper question permitted that affected the substantial rights of appellants? If, under the questions permitted to be asked by counsel for appellant and answered by witnesses, the questions of facts in issue by the pleadings were fairly submitted to the jury, then and in that particular there is no error affecting the substantial rights of either party, and hence no ground for reversal. See the evidence of witnesses in the record, and it will be apparent that no injury to appellant's substantial rights was occasioned by any questions asked by respondent's counsel. There is abundance of evidence independent of witness Randall that he went into immediate possession of the goods purchased and continued in the open and notorious possession of the same. This evidence is ingrafted into bill of exceptions to explain the same.

See evidence of Black & Daniels.

102 No objection appears to have been taken to the answer of any witness to any question. A judgment will not be reversed on account of the admission of erroneous testimony, if it can be seen from the record that the appealing party suffered an injury by its admission.

Moore *vs.* Rollins, 36 Cal., p. 333.
Moat *vs.* Rays, 45 Cal., p. 379.
Hastings *vs.* Jackson, 46 Cal., p. 234.

The question asked witness Daniels: "What was done with the note" was not cross-examination. No question having been asked said witness by counsel for respondent concerning any note. Its admission or rejection was purely in the discretion of the court.

See 17 Wallace, Ray *vs.* Missouri, page 542.
Kidd *vs.* Temple, 22 Cal., 255.
Carpenter *vs.* Gardner, 29 Cal., 160.
Page *vs.* O'Niel, 12 Cal., 483.
Hoag *vs.* Pierce, 28 Cal., 187.
Tyler *vs.* Greene, 28 Cal., 406.
Buye *vs.* Cal. Stage Co., 28 Cal., 160.

103 A general exception to instructions, which does not point out the particular errors complained of will be disregarded when it does not point out the specific error complained of, and it appears that a part of the instructions given were good, and that it does not appear in defendants' exceptions that he "duly" excepted to the instruction.

Symonton *vs.* Kelly, 1 Montana, page 363.
Caldwell *vs.* Murphy, 11 N. Y., page 417.

Only such instructions [as] were specifically excepted to can be noticed.

The court cannot consider any of the exceptions to any of the instructions in this case, from the fact that it does not appear from the record that any exception to either of the said instructions was reduced to writing and filed with the clerk before said cause was submitted to the jury.

See Code of Civ. Proc. Montana, sec. 253, subdivision 7.

But, if the court should consider any of the instructions, we say, as to the 7th instruction, it is not only the law considered
104 as an abstract proposition, but is exactly in the language of the statute.

Cod. Sts. of 1872, page 394, sec. 20.

And which applies not to any particular case, but to the whole of the chapter "on void and fraudulent conveyances."

As to the 12th instruction, the objection to this instruction is that interest might be recovered on the value of the goods.

The rule is that when the property converted has a fixed value, the measure of damages is that value with legal interest from the time of conversion.

Hamer *vs.* Hathaway, 33 Cal., 117.
Douglass *vs.* Kraft, 9 Cal., 562.
Bohm *vs.* Dunphy, 1 Mont., 333.
McTavork *vs.* Chamberlin, 25 Ill., 219.

8th instruction we consider unobjectionable. Refused instruction No. 1 of defendants' is fully covered by instruction No. 5 given by the court.

See Record, pages 36 and 37.

As to instruction No. 3, requested by defendants and refused by the court. There was no evidence showing or tending to show that at the time of the levy that Randall was jointly in possession
105 of the property with Black & Daniels, or either of them, but all the evidence showed the reverse of that proposition, and if any portion of the entire instruction asked is erroneous the court would have erred in giving it, notwithstanding a portion of said instruction might have been good law. It was correctly refused.

It was proven by the plaintiff on the trial in the court below that the defendant had actual notice of the sale and transfer from Black & Daniels to Randall, of the property long previous to the levy of

the attachment on the goods sought to be replevined in this action and admitted by defendants.

See Record, page 34.

Instruction No. 4, requested by defendants, was inapplicable, and in any event was fully covered by instructions given in said cause by the court.

13th instruction, requested by defendants, was wholly inapplicable, as there was no evidence in the case to warrant any such instruction.

See 5 Blatchford, page —, United States *vs.* one Still.

106 As to the 14th instruction, requested by defendants and refused by the court, it is not the law. The true rule being that laid down by the court in the instruction, Record, page 39, and authorities hereinbefore cited on that question are here referred to as settling that question.

As to instruction No. 11, requested by defendants and refused by the court, we say that the defendants on the trial expressly admitted that the goods in question were levied upon at the request and instance of the defendants.

See Record, page 30.

Also, see answer, Record, pages 6 and 7, in which the same admission is made.

In regard to the objection to 3d instruction, requested by plaintiff, we fail to perceive why a sale of property by a vendor, and an actual taking of possession by the vendee as his own property, with the consent of the vendor, does not constitute a delivery. The construction is clearly proper, and the law correctly stated.

As to the propriety of pl'ff's instruction, No. 7:

See Tully *vs.* Harlow, 35 Cal., 303.

107 McCarty *vs.* White *et al*, 21 Cal., 503.

Jackson *vs.* King, 4 Cow., 221.

Gandette *vs.* Travis, 11 Nev., 156.

The question in the case at bar for the jury to determine was, as to whether the sale from Black & Daniels to Randall was fraudulent as against the creditors of Black & Daniels or not, and we conceive that under the instructions that the case was fairly presented to the jury for their determination, and that there is, upon the whole, no error affecting the substantial rights of appellants in the premises, and that the judgment should be affirmed.

VIVION & PIERCE,
CHUMASERO & CHADWICK,
Att'ys for Respondent.

Thereupon this cause came on to be heard before the court upon the transcript of the record filed herein, and was argued by counsel and submitted.

108 And afterwards, to wit, on the 18th day of August, A. D. 1880, said cause coming on for determination on appeal, the court announced its decision herein, the entire court concurring therein, and ordered that the judgment of the court below entered in said cause be modified, and as modified, affirmed, in accordance with the written opinion of this court, to be filed hereafter.

And afterwards, to wit, on the 9th day of September, A. D. 1880, the court filed in said cause its opinion in writing, of which said opinion in writing, in words and figures, the following is a copy, to wit:

In the Supreme Court, Montana Territory, August Term, A. D. 1880.

WILLIAM H. RANDALL
vs.
ISAAC GREENHOOD *et al.* } Opinion.

Appeal from First District, Gallatin County.

Opinion of the Court, by Wade, Chief Justice.

109 This is an action to recover the value of a certain stock of goods alleged to have been wrongfully converted by appellants.

The record shows that on the 4th day of May, 1878, Messrs. Black & Daniels, merchants, doing business at Bozeman, Gallatin county, sold their stock of goods and a large amount of other property to the respondent for the sum of $15,000; and the respondent, after deducting from the sum of such purchase money $770, the amount he was owing them, executed to them his note, payable one day after date, for the sum of $14,230, and, as is alleged, took possession immediately of such goods and property.

It further appears that the appellants, being creditors of Black & Daniels at the time of such sale, on the 14th day of May, 1878, commenced an action against them and attached the goods in question, charging that the sale to respondent by Black & Daniels was fraudulent, and made to hinder, delay, and defraud creditors. They obtained possession of the goods by virtue of their attachment, and converted the same, and this action was instituted to recover the value thereof.

110 There was a trial and verdict in favor of the respondent for $3,600, and judgment thereon, from which this appeal is taken.

There were many exceptions taken during the trial, and we will consider such ones as the appellants rely upon in their brief for a reversal of the judgment.

1. The record shows that the appellants, before the trial commenced, made a motion for judgment on the pleadings, which was overruled, and thereafter, and during the progress of the trial, they asked and obtained leave to amend their answer; thereupon the respondent asked and obtained leave to amend his replication, to

the granting of which leave the appellants excepted. But for what reason the record fails to disclose. The exception being general, it only raises the general question as to the authority of the court to grant leave to amend pleadings during the progress of a trial. The power of the court to grant leave to either party to amend pleadings during the progress of the trial, and even after verdict and judgment in furtherance of justice, is so well settled, and so deeply imbedded in the code practice as to need no authorities to support it. We will only refer to some of the decisions of this court. See Wormell *ex.* Reins, 1 Montana, 627; 2 Montana, 415.

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2. The respondent being a witness in his own behalf, was asked the following question: "State whether or not at the time of the sale and purchase between you and Black & Daniels, you went into the immediate possession of the property and continued so?"

This question was objected to, not so much because it was leading, but because it involved a question of law, improper for the witness to answer. The objection was overruled, and the appellants excepted.

The question being tried was whether at the time of the sale the respondent openly and actually took immediate possession of the goods. In this connection the word immediate has no technical or special meaning. It is used in its ordinary sense in the statute. It signifies present, instant; not deferred by an interval of time, and the question is of the same import as if the witness had been directed to state the facts as to the transfer of possession, and had answered that, at the time the sale was made, the respondent instantly and without any interval of time went into the possession of the property. Perhaps the form of the question suggested the answer. If this were so, and if technically and strictly the form of the question were improper, yet we cannot see how the appellants could have been injured by the inquiry. They had the power upon cross-examination to have inquired into all the facts and circumstances attending the transfer of possession. This inquiry opened the door to such cross-examination, aided by the searching power and force of direct leading questions. It is very apparent that the appellants could not have been injured by the question and answer.

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3. Z. H. Daniels, being one of the parties to the sale from Black & Daniels to respondent, testified on his examination-in-chief concerning such sale, and that respondent gave his note for $14,270.00 and took possession of the goods. On cross-examination the witness was asked this question: "What was done with the note of Randall after it was given to you?" which said question was objected to by respondent as not cross-examination, and the objection was sustained.

113

In cases of fraud wide latitude is given to a cross-examination. Was the sale sham and fraudulent? Was it made to hinder and delay creditors? The execution and delivery of the note had a

bearing upon these questions, and was competent proof tending to show the *bona fides* of the transaction.

Did the respondent really and in good faith give his note for the purchase price of the goods, or was its execution a mere blind to cover up the fraudulent sale? The witness having testified in support of the sale that the note was given, it became competent on cross-examination to draw out all the facts and circumstances attending such execution. Was the note given to Black & Daniels and by them fraudulently returned to respondent; or, did they place it in the hands of a third person for his protection and benefit? All these matters belonged to the case of appellants, but the witness
114 having given in evidence the execution of the note as tending to show the good faith of the sale, it became competent on cross-examination to show how the note was disposed of immediately after its execution, if the inquiry was made to show fraud in the transaction. The purpose of the inquiry is not disclosed in the record. We have no means of knowing what the appellants proposed to prove by making the inquiry. The answer to the question might have been competent or it might not. The appellants ought to have stated and placed in the record what they proposed to prove, then this court could have passed upon its competency. But if by the question and the answer sought the appellants proposed to prove that the execution of the note was a sham and fraudulent, were they injured by the action of the court in sustaining the objection to the question? Evidently not. For when they came to present their case to the jury they might have placed Daniels on the stand, and asked him in precisely the same words the
115 question they had asked him upon cross-examination. Making the witness their own would not have forfeited any of the advantages a cross-examination gave them in such a case, where the inquiry on cross-examination would have been competent upon an examination by them in chief.

And so, if the objection to the question had been improperly sustained, none of the substantial rights of the appellants were thereby affected, and in such a case, under the provisions of the Code, a judgment should not be reversed.

4. The goods levied on by the attachment in favor of appellants in their action against Black & Daniels were sold at auction by the sheriff. The measure of damages was the value of the goods at the time of the levy of the attachment, and not what they brought at auction, as contended for by appellants.

5. Counsel for appellants contend that instruction number
116 5, given to the jury at the instance of respondent, is incorrect. The record shows that no exception was taken to instruction number 5, and that there was no attempt to save an exception thereto. The Code provides, sec. 253: "If any party to the trial desires to except to any instruction given by the court, or to the refusal of the court to give an instruction asked for, or any modification thereof, he shall reduce such exception to writing, and

file the same with the clerk before the cause is submitted to the jury."

This section contemplates that the exception to the instructions shall be reduced to writing in a bill of exceptions (which, of course, must be signed by the judge) and filed with the clerk before the cause is submitted to the jury. Not one of the exceptions to the instructions as shown by the record comply with these requirements. The mere statement in the record that the court was asked to give certain designated instructions, which were refused, and an exception taken, or that the plaintiff objected to the giving of certain instructions that were afterwards given, to the giving of

117 which the party objecting excepted, without reducing such exception to writing, and filing the same with the clerk, is no compliance with this section of the code.

As to instruction number 3, asked for and given at the request of respondent, which from its substance is presumed to be the one referred to by counsel as instruction number 5, the record recites as follows:

"And the said defendant objected to the 3d instruction requested by the plaintiff, for that the same," &c., &c. "And the said objection was overruled, and to which ruling and giving of said instruction defendants then and there excepted."

Whether this statement was reduced to writing before the cause was submitted does not appear, and it certainly does not appear to have ever been filed with the clerk.

We cannot regard exceptions that have not been taken and saved in substantial compliance with the statute. If an exception to an instruction should be reduced to writing and signed by the judge, if not filed with the clerk before the submission of the cause

118 to the jury, it could not be considered.

6. In this action the respondent sought to recover from the appellants certain property alleged to be wrongfully withheld by them, and in case a return could not be had, the value thereof. The verdict finds for the respondent, and for a return of the property mentioned in the complaint, and in the event the same cannot be returned, assesses his damages at $3,000, the value of the property and $600 interest thereon, from the date of the levy to the time of trial.

The claims and demands upon which interest is allowed depend entirely upon the statute. This claim or demand of respondent against appellants is not of the kind upon which interest can be allowed until after judgment.

See Cod. Sts., page 497, Sec. 2.

Isaacs *vs.* McAndrews, 1 Mont., p. 454.

The judgment is too large by $600.

It is therefore ordered that the judgment be reduced from

119 $3,600 to $3,000, and when so modified the same is hereby affirmed with costs.

DECIUS S. WADE, *Chief Justice.*
WM. J. GALBRAITH, *Asso. Justice.*
E. J. CONGER, *Asso. Justice.*

Thereupon judgment on appeal was duly entered in said cause, to date from August 18th, 1880, when the decision of the court herein was announced

120 In the Supreme Court of Montana Territory, August Term, 1880.

WILLIAM H. RANDALL, Plaintiff and Respondent,

vs.

ISAAC GREENHOOD, FERDINAND BOHM, RICHARD O. HICKMAN and Lee M. Cohn, partners, &c., and T. B. Warfield, sheriff of Gallatin county, M. T., Defendants and Appellants.

Judgment on Appeal.

Whereas, in the present term of August, in the year of our Lord one thousand eight hundred and eighty, the above-entitled cause was brought on to be heard before said supreme court, on the transcript of the record of the district court in said cause, which was brought into said supreme court by virtue of an appeal in conformity with the statute of said Territory and the rules of this court in such case made and provided, and was argued by counsel.

121 Whereupon it is now here ordered and adjudged by this court, that the judgment of the court below, entered in said cause on the 12th day of May, 1880, be, and the same is hereby, modified, in that the said judgment be reduced from the sum of $3,600 to the sum of $3,000, and as so modified, affirmed with costs.

And it is further ordered and adjudged by this court, that the said plaintiff and respondent, William H. Randall, recover against said defendants and appellants, Isaac Greenhood *et al.*, —— dollars for his costs and disbursements expended herein, and have execution therefor ——— 18th August, 1880.

Thereupon the said defendants and appellants moved the court for an order granting to them a writ of error for the removal of said cause to the Supreme Court of the United States, which was granted. Whereupon, on the 12th day of October, 1880, the appellants filed and lodged in the office of the clerk of said Supreme Court their writ of error herein, which said writ of error is in the words and figures following, viz.:

122 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of

the judgment of a plea which is in the said supreme court of Montana Territory before you, or some of you, in a cause between William H. Randall, plaintiff and respondent, and Isaac Greenhood, Ferdinand Bohm, Richard O. Hickman, and Lee M. Cohn, partners, &c., under the firm-name of Greenhood, Bohm & Co., and T. B. Warfield, sheriff of Gallatin county, Montana Territory, defendants and appellants, a manifest error hath happened to the great damage of the said Isaac Greenhood *et als.*, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, do command you that if judgment be therein given that then, under your seal, distinctly and openly, you read the record and proceedings aforesaid, together with all things concerning the same, to the Supreme Court of the United States, to-
123 gether with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness Morrison R. Waite, Honorable Chief Justice of said Supreme Court, this 12th day of October, A. D. 1880.

[SEAL.] ISAAC R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Duly allowed in open court.

And afterwards, to wit, on the 16th day of October, A. D. 1880, said defendants and appellants filed in said cause their undertaking to accompany said writ of error, of which said undertaking, in words and figures, the following is a copy, viz.:

124 Know all men by the presents, that we, John Kinna, Moses Morris, and A. Sands, as sureties of Lewis and Clarke county, Montana Territory, are held and firmly bound unto William H. Randall in the full and just sum of three thousand five hundred (3,500) dollars to be paid to the said William H. Randall, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents. Sealed with our seals, and dated this 16th day of October, A. D. 1880.

Whereas, lately at a term of the supreme court of the Territory of Montana, in a suit pending in said court between William H. Randall, plaintiff, and Isaac Greenhood, Ferdinand Bohm, Richard O. Hickman, and Lee M. Cohn, partners, &c., as defendants, there was rendered a final judgment in favor of the plaintiff and against the said defendants for more than the sum of two thousand dollars, exclusive of costs; and the said defendants having sued out a writ

of error, and filed the same in the clerk's office of the said Su-
125 preme court of the Territory of Montana to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, next.

Now the condition of the above obligation is such, that if the said defendants shall prosecute their said writ of error to effect, and answer all damages and costs, if they shall fail to make good their plea, and shall pay such sum as shall be awarded against them, not exceeding the sum mentioned in this obligation and interest, then the above obligation to be void, else to remain in full force and virtue.

JOHN KINNA. [SEAL.]
MOSES MORRIS. [SEAL.]
A. SANDS. [SEAL.]

Sealed and delivered in presence of—
F. R. SHAFFER.
SOL. POZNAINSKY.
THEO. HIED.

And on the same day the defendants and appellants filed herein their *their* citation, of which, with the endorsements thereon, the following is a copy, viz.:

126 United States of America. In Supreme Court.

ISAAC GREENHOOD, FERDINAND BOHM, RICHARD O. HICKMAN, and LEE M. COHN, partners, &c., doing business under the firm name and style of Greenhood, Bohm & Co., and T. B. Warfield, Sheriff, Plaintiffs in Error,

vs.

WILLIAM H. RANDALL, Defendant in Error.

To William H. Randall, defendant in error, and to Chumasero & Chadwick, and Shober & Pierce, his counsel of record:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error
filed in the clerk's office of the supreme court of Montana
127 Territory, wherein Isaac Greenhood, Ferdinand Bohm, Richard O. Hickman, and Lee M. Cohn, partners, &c., are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness Honorable W. J. Galbraith, a justice of the supreme court of Montana Territory, this 14th day of October, A. D. 1880.

WM. J. GALBRAITH,
Associate Justice Supreme Court Montana Territory.

Upon filing the undertaking, as required by law in such cases provided, a supersedeas is ordered and granted herein.

WM. J. GALBRAITH,
Associate Justice of the Supreme Court of Montana Territory.

Affidavit of Service.

TERRITORY OF MONTANA, *Lewis and Clarke County:*

128 Joseph K. Toole, makes oath, and says: That he is one of the attorneys for the appellants in the foregoing cause; that he served a copy of the within citation on William H. Randall, and also a copy upon Messrs. Vivion & Pierce, his attorneys of record, by mailing the same to each of them at Bozeman, Montana Territory, their place of residence, on the 16th day of October, A. D. 1880, plainly marking their address on a sealed envelope, and prepaying the postage on each of the same.

JOSEPH K. TOOLE.

Subscribed and sworn to before me, this 16th October, A. D. 1880.

I. R. ALDEN, *Clerk.*

129 In the Supreme Court of Montana Territory. August Term, 1880.

ISAAC GREENHOOD *et al.*, Plaintiffs in Error,
vs.
WILLIAM H. RANDALL, Defendant in Error.

I, Isaac R. Alden, clerk of the supreme court of Montana Territory, do hereby certify, that the foregoing one hundred and twenty-eight pages, numbered from 1 to 128, inclusive, contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in the above-entitled cause, as the same remain on file and of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said supreme court, this 3d day of February, A. D. 1881.

[SEAL.] ISAAC R. ALDEN,
Clerk Supreme Court of Montana Territory.

Endorsed on cover: Montana Territory supreme court. No. 314. Isaac Greenhood, Ferdinand Bohm, Richard O. Hickman, and Lee M. Cohn, partners doing business as Greenhood, Bohm & Company, and T. B. Warfield, sheriff, plaintiffs in error, *vs.* William H. Randall. Filed 27th September, 1881.

111-775

IN THE
SUPREME COURT OF THE UNITED STATES.

No. 314.

ISAAC GREENHOOD, et al.,
Plaintiffs in Error,

vs.

WILLIAM H. RANDALL,
Defendant in Error.

In Error to Supreme Court of Montana Ter.

Brief of E. W. TOOLE,
Attorney for Plaintiffs in Error.

GEO. E. ROOT & CO., PRINTERS, HELENA, MONTANA.

IN THE

Supreme Court of the U.S.

No. 314.

ISAAC GREENHOOD, et al.,

PLAINTIFFS IN ERROR.

vs.

WILLIAM H. RANDALL,

DEFENDANT IN ERROR.

ERROR TO THE SUPREME COURT OF MONTANA.

BRIEF OF PLAINTIFFS IN ERROR.

This is an action of "Claim and Delivery of Personal Property," under the statutes of the Territory of Montana. The defendant in error alleges in his complaint that, on the *10th day of May, 1878*, he was the owner, and in possession, of the property in controversy, of the value of

four thousand dollars. That on or about the *14th day of May, 1878*, plaintiffs in error, without his consent, wrongfully took the same from his possession, and that on the 15th day of May, 1878, he demanded possession of said property, which was not delivered, but wrongfully and unlawfully detained, by reason of which he was damaged in the sum of five thousand dollars. The prayer is for a return of the property, for four thousand dollars, the value if a return cannot be had, and five thousand dollars damages with costs of suit.

The answer denies the wrongful taking of the property, and avers that it was taken by the *Sheriff* upon a writ of attachment against the *goods* and *chattels* of Black & *Daniels*, which constitutes the trespass complained of, and avers that it was of no greater value than fifteen hundred dollars. That the property was sold to hinder, delay and defraud their creditors, and that there was no immediate delivery and continued change of possession thereof on account of which the same was liable to be taken by the Sheriff upon said writ. The replication puts in issue the new matter set up in the answer, and upon these pleadings the case went to trial.

Before proceeding to examine the questions presented in this case, we desire to call attention of the Court to the anomalous condition in which

the record appears. After the "Bill of Exceptions" taken by plaintiffs in error had been properly signed, as will appear from record pages 23 to 29 inclusive, and as engrossed upon pages 1 to 23 inclusive, (which engrossed Bill is all that should properly be in the record), counsel for defendants in error, *after an appeal* had *been regularly taken*, obtained from the Hon. E. I. Conger what purports to be an amendment to the Bill of Exceptions theretofore signed during the trial of the cause, as will be seen by record from pages 23 to 33 inclusive. Counsel seem to have proceeded upon the basis that a motion for a new trial had been made, on account of which the whole testimony should have been incorporated in the Bill of Exceptions originally signed by the Judge. As plaintiffs in error rely upon the exceptions taken during the trial of the cause, and not upon the insufficiency of the evidence to support the verdict, only so much of the evidence as was necessary to explain the objections presented by the Bill of Exceptions, was necessary, or proper to be embraced in it. It will be seen that none of the objections made or exceptions taken in the original Bill of Exceptions are in any way changed or modified, but a large mass of testimony is presented which can subserve no other purpose than to incumber the record. It will and

would, without this additional testimony, be assumed that the evidence was sufficient to support the verdict. It is of no consequence, inserted in the record, at the instance of defendant in error, without any fault of appellants, and should not in any way interfere with a full consideration of the questions presented, on account of thus being there. In fact we might say that it was signed and allowed without any authority to do so, and should not be considered if it did materially or at all, change the Bill of Exceptions theretofore signed *during the term*.

Had the plaintiffs in error considered the evidence given on the trial of any importance except in so far as it tended to explain the errors assigned, this record might present a different phase so far as the merits of the controversy is concerned, upon the sufficiency of the evidence to support the verdict.

We have thought it in place to say this much, on account of the condition of record, and will poceed, as did the Court below, to consider the errors presented by the Bill of Exceptions.

Four legal propositions are alone presented by this record, which are as follows:

1st. Did the Court err in permitting the amendment to the replication, by inserting the same upon the margin thereof?

2d. Did the Court err in excluding certain interrogatorie , propounded by appellants, and in not permitting the witness to answer the same under *the objections* made thereto?

3d. Did the Court admit improper testimony to go to the jury under *the objections* made thereto? And

4th. Did the Court present the law of the case properly to the jury under the instructions given or err in not giving those offered and refused?

We will discard all the other errors assigned in this record, and consider the foregoing in the order presented.

"Did the Court err in permitting the amend-"ment to the replication by inserting the same "upon the margin thereof?"

As will be seen by the record, page 6, the replication, after being amended in material particular, was not thereafter verified as required by the statute. Section 94, page 57, of the Code of Civil Procedure is as follows: "All complaints, an-"swers and replications shall be verified as pro-"vided in this section. * * * The affidavit "of verification shall state that the facts stated "in the pleading are true to the knowledge of the "person making it, except as to those matters "which are therein stated on information and be-

"lief, and as to those matters he believes it to be "true." * * * *

Plaintiff in error moved for judgment on the pleadings, a practice recognized under our code by the decisions of our Courts, for the reason that the allegations in the answer, that the sale of said property was not accompanied by an immediate and actual delivery, and continued change of possession was not denied in the replication. Thereupon the amendment allowing this denial, raising a material issue, was allowed, by inserting the same upon the margin of the replication, and plaintiffs in error, under objections and exceptions, forced to go to trial upon this unverified pleading.

See record, page 6.

There is no valid pleading unless it is verified. It cannot be said that no injury occurred on account of the amendment. It deprived his adversary of a statutory right to have the party put upon his oath as to the issues formed upon which he is to go to trial. He had as much right to require the verification of this pleading, under the statute mentioned, as he would to demand that the witnesses be sworn upon giving testimony on the trial. Injury must be implied from the violation of such rights as these. No other theory is consistent with the right of the law-making power

to judge of the expediency of, and authority to make, such a statute.

2d. "Did the Court err in excluding certain interrogatories propounded by plaintiffs in error, and in not permitting the witness to answer, under the *objections made thereto?*"

The first question presented by this proposition is found on record, page 10. The issue tendered by the pleadings was fraud in the sale of the goods to defendant in error. Daniels, one of the vendors of the goods, being a witness upon the stand to establish the bona-fides of the transaction, "testified in chief that he sold the goods of "Black & Daniels to Randall; that he, Randall, "gave his note for them to B. & D. Counsel for "plaintiff in error asked the witness on cross-"examination the following question:"

"What was done with the note of Randall after "it was given to you?"

"Which was objected to, *as not cross-examina-"tion*, which was sustained by the Court, said "witness not permitted to answer, and to which "defendants then duly excepted." Deeming this an error which is fatal to the trial, we have quoted verbatim from the Bill of Exceptions contained in the record on p. 10 supra. It will be observed at once that the *only* objection made to this interrogatory was, because it was not *proper* "*cross-*

examination." No other was suggested by reason of which plaintiffs in error were called upon to explain it away, or show its relevancy or materiality. If it had been original evidence for the defense, and its relevancy or materiality was not clear or apparent from the issues formed, the Court might with propriety require counsel to state the object of the question, or what evidence was sought to be elicited by it. But being a question asked on cross-examination, and the sole objection being that it was not proper *as such*, the Court will look only to the legitimacy of the inquiry under the objection urged. If the objection had been that the matter *was immaterial*, yet if it was cross-examination the Court would overrule the objection even if it was immaterial. If it was material for defendants in error to show in what way these goods were paid for in support of the bonafides of this transaction, and it will never be contended that it was not, i. e., that a note was executed for them, it was equally material as affecting this question to know what was done with it. Hence we are met with the simple proposition that it was material for defendant in error to show that a note was given in consideration for the property and equally as material for defendant to inquire as to what was done with it. That no objection was raised to this cross-interrogatory

upon the grounds of its immateriality. The Court was never called on to pass on this question and did not do so. Counsel was not called upon consequently to explain its object because none was required under the *objection* made. The naked and only question is, was it legitimate *cross-examination* to inquire what he did with this note after it was given him. It will not do to speculate upon what the answer of the witness might have been. Whether it would have been damaging or beneficial. This, with equal propriety, may be said of every question. Did plaintiffs have a right to his answer? Whether it be that he retained it or gave it back to the vender. Whether its delivery was a sham to enable him to testify as far as he had gone or a reality. Whether it was given as a matter of form or substance. The opinion of the learned Judge in the Court below upon the competency of this cross-examination is potent and overwhelming. We most respectfully dissent from his argument and conclusions that plaintiffs in error were not injured on account of the erroneous ruling of the Court for that plaintiffs in error might have made him their own witness and elicit his testimony upon this subject. See record, page 43. Legitimate cross-examination is said to be an estimable right, in connection with the trial of a case.

and it should not be frittered away. Its intrinsic value would be utterly destroyed if in *lieu* of it, the party can be compelled to make the witness his own. The entire rules of law applicable in such cases would be subverted. The principles applicable to original evidence, and that drawn out on legitimate cross-examination, are widely at variance. It is a general rule that when a party to a transaction which becomes a material subject of inquiry details a part of it in evidence, it is competent on cross-examination to elicit the whole of such transaction. And the case at bar instead of suggesting grounds for a relaxation of the rule affords most potent reasons for giving it the fullest latitude. The inquiry was in substance: Did the transaction cease on the delivery of the note? Being proper cross-examination it was legitimately a part of his adversary's testimony. He could impeach the credibility of the witness, contradict his testimony, and was not bound by his answers. Had he introduced him as his own, he would vouch for his veracity, and would not be permitted to disprove his evidence. As legitimate cross-examination we had a right to search for the facts, of one of the parties to the transaction in question. The effect his answer would have had upon the result of the trial was never tested and remains unknown. It was

a flagrant error, and injury will be presumed, at least until the contrary appears. Did the record show that plaintiff in error actually recalled the witness, made him his own, and interrogated him with respect to the matters sought to be inquired of on cross-examination, and his answers were such that it did not benefit him, it might with more propriety be contended that the presumptions of injury from this error were removed. It certainly is not a duty of the opposing party to clear up the errors committed by his adversary. It was not the business of plaintiff in error to show what his answer would have been. The Court refused to permit him to do so on cross-examination, and he could not be required to show what such answers would have been in any other way. Neither Court or counsel inquired into the purpose of the question. Its relevancy and competency was apparent. The objection and only objection urged was, that it was not competent cross-examination. If it was objectionable for any other reason it could not have been introduced at all if offered by plaintiff in error as his own, in the manner suggested by the learned Judge in delivering the opinion of the Court below. All other grounds are deemed waived except the one urged, i. e., that it was not cross-examination. We confidently insist that

these principles are too firmly embedded in American and English jurisprudence to be at this day overturned. It cannot be said that no substantial right of a party is invaded when he is deprived of the privileges and benefits of a cross-examination, except upon condition that he may take the hazards and disadvantages of making the witness his own. Mr. Justice Clifford in "The Ottawa," 3d Wallace 271, uses this language: "Cross-"examination is the right of the party against "whom the witness is called, and the right is a "valuable one," &c. * * * In an error like this injury will be presumed unless the record show to the contrary.

This, we believe, is an inflexible rule in the rejection of competent or admission of incompetent evidence in a case.

Rice vs. Heath, 39th California 609.

Sweeney vs. Reilley, 42 California 402.

Under this head we will refer to but one more exception found on page 13 of the record. Evidence had been introduced showing that an inventory and estimate of the value of the goods made, as a basis upon which defendant in error purchased, that at the time of the levy of the attachment the goods were worth from $4,500 to to $5,000. See testimony of Daniels, Black & Randall, p. 8, 9, 10 and 11 of record. Clarke, the

auctioneer, being on the stand, stated in support of the *bonafides* of the transaction, that defendant in error was in possession when the goods were attached, while so being sold at *auction*, and that they were worth about $4,500, was asked on cross-examination the following question: "What "prices were said goods bringing with respect to the value of the same?" Which was objected to "*for the reason* that the price at auction was no "criterion by which the value of said goods could "be established. Which objection was sustained "by the Court, said witness not permitted to an-"swer, to which order sustaining said objection "the defendant then and there duly excepted."

See record, p. 13.

Upon this proposition we submit there was error.

That it was admissable as going to the bona-fides of the sale it would seem there could be no question. It was competent to show the jury whether a vendor of goods, purchased at their value, was selling them at auction for one-fourth their mere worth.

It was competent as well as the preceding interrogatory, in reference to what the goods were bringing at auction, and the Sheriff's entry of such sales, upon showing as plaintiffs in error proposed to do that no changes in prices had ac-

cruied. (See record, p. 13.) Upon this point we refer to the following cases: Gill vs. McNamee, 42d N. Y. (3 Hand) 44–46; Campbell vs. Woodworth, 20 N. Y. 499; Dixon vs. Buck, 42 Barbour at page 74. The case of Whitehouse against Atchison; 3d Carr & Payne, 344, is in point upon both proposition. The objection being confined to its admissability as tending to establish the value of the goods, being a material issue in the case, was improperly sustained, and competent evidence for such purpose thereby excluded.

Crounse vs. Felch, 1st Abbott 475.

Central Law Journal, Vol. II., No. 6, Aug. 6th, 1880, p. 118.

In Campbell vs. Woodworth, 20th New York 499.

The action being in the nature of trover, the Sheriff justified taking the property under an execution against one Chapman, plaintiffs' assignor. On the trial plaintiffs examined several merchants to prove the value of the goods, it appeared they had been sold at auction the same place as in the case at bar. Defendant then offered to prove the price the goods brought at such auction. This evidence was objected to. Objection sustained, evidence excluded, and exceptions taken. In delivering the opinion of the Court, Denio, J., says: "We think the evidence should have been re-

"ceived. * * * In such cases as the present we "think that the evidence of what the goods sold "for at the auction should be received for the "consideration of the jury, to be compared with "the other evidence of value that might be offered, "and to be allowed such weight as the circum-"stances of the sale and the degree of competi-"tion actually exhibited should entitle it to." He then quotes with approval the language of Lord Tenterdon, Ch. J., in Whitehouse against Atkinson, 3 Carr & Payne 344. Same case in 14th Eng. Com. Law Reports 601. This was an action by the assignee of a bankrupt against a Sheriff who had sold the goods on execution. Tenterden, Ch. J.: "With respect to the dam-"ages plaintiff is not bound by the sum at which "goods have been sold at auction, but when the "plaintiff is an assignee who must have sold the "goods if they had come into his hands before "any sale by the Sheriff, it often happens that the "jury considered the sum at which they were ac-"tually sold at auction as a fair measure of value."

In the case under consideration the goods were being sold at auction when levied upon, and the alegations and proof were confined to the value of the goods "before the sale at auction by the Sheriff," on account of which this decision is especially applicable.

In Kent *vs.* Whiting, 9th Allen (Mass.) 62, the action was to recover for the conversion of certain goods sold on execution by the Sheriff. For the purpose of showing the real value of the articles, the defendant offered to prove the price for which each article sold; but evidence was excluded. Held error: Bigelow C. J. "A sale is matter-of-fact not of opinion, and is direct evidence of the worth of the thing sold. In fact the price for which an article is bought and sold constitutes its market value, and is ordinarily the best and most satisfactory standard by which to estimate the amount at which the same, or similar articles, are to be appraised in the assessment of damages. * * * In many cases a sale by auction would furnish very strong if not decisive evidence of value. It is said the sale was a forced one under legal process, etc. * * * This is an argument that goes to the weight and not to the competency of the evidence."

Plaintiff proposed to even connect this testimony with evidence that no change of prices had occurred since the alleged damages and the auction sale. In this respect the case of Bingham *vs.* Evans, 113, (Mass.) 538, will be found exactly in point.

Mr. Chief Justice Gray, in delivering the opinion of the court, says: "The amount for which

plaintiffs property was sold by auction was competent evidence of its value at the time of the sale, and there was evidence tending to show that it had not depreciated between the dates of the appraisement and the sale by auction. There was, therefore, sufficient evidence that the market value, etc., of defendants property was not, and that of the plaintiffs was, less than the estimate put upon it by the appraisers."

By reference to the record, page 13, it will be seen that plaintiffs in error propose to connect the evidence of value at the Sheriffs sale with the value proven at the date of the auction sale being conducted by Clarke, auctioneer of defendants in error, at the time of the levy, by showing that no change in it had taken place. Besides it will be seen that no objection was urged on account of the different dates of sale and conversion, but "because prices obtained for goods at Sheriffs sale is no evidence of the value of the goods." Had the objection been the one anticipated by council for plaintiffs in error, the grounds for it were removed, and the testimony made competent, under any phase of the case. Other authorities might be cited upon this point, were it deemed necesary or proper to do so. We believe those cited present the doctrines announced by both American and English cases.

Did the Court admit incompetent testimony on the part of the plaintiff to go to the jury under objections and exceptions of plaintiffs in error.

As under the preceding proposition we will advert to but two of the exceptions taken to the admission of incompetent evidence.

The plaintiff in this action, being a witness in his own behalf, was asked the following question: "State whether or not you notified the defendants or their agent, that you had purchased the property?"

This question was "objected to, as leading, as hearsay, as being declarations of plaintiff in his own behalf, and as only bearing upon the question of wilful damages, which is not claimed, if admissable at all, and as incompetent and inadmissable for any purpose, and is misleading upon the question of possession, immediate delivery, and actual, open and unequivocal possession." See record, page 9. "I did."

"State whether you notified Greenhood, Bohm & Co. and other creditors of your intention to sell out?" "Objected to, as leading, incompetent and misleading, which was overruled, and to which defendants excepted." Answer: "I notified Greenhood in New York City that I would sell out; this was in the spring or summer of 1878." See record, page 10.

These questions were incompetent for the reasons assigned, and the answers could have but one tendency, and that was to mislead the jury and prejudice the case of the defendant. It was incompetent to establish a sale because it was the declarations of the party to the sale and said in his own behalf. This was the only issue, and to this alone could it be directed. It was an attempt to show that the plaintiffs in error had recklessly and wilfully levied the attachment, arouse the feelings of the jury, and direct their attention from the real issues, instead of leaving them to determine the naked question of the validity of the sale and delivery of the property upon the legitimate facts in the case. And the same way he said of the notices in the newspapers, &c. Found on page 12 of the record.

The same objection is applicable to the inquiry and answer as to whether any of the debts of Black & Daniels had been paid by Randall. See record, page 11. Plaintiffs in error could not even inquire as to what became of the note given for the goods. Randall, if garnisheed, could have properly answered that he did not know whether Black & Daniels held the note, and the fact that under such circumstances he was still paying the orders of Black & Daniels was not germain to any issue in the case drawn out by plaintiffs in

error and was misleading. What defendant in error told Greenhood or his agent about selling the goods might be inquired of by plaintiffs in error, but it was incompetent to be produced by the party in his own favor.

Did the Court properly present the law in the instructions given, or commit any error in refusing those which were refused?

The Court to which the writ of error in this case issued, refused to consider the errors complained of, with respect to the instructions, for the reason that it did not appear from the bill of exceptions, "that the exception was reduced to writing and filed with the Clerk before the cause was submitted to the jury."

Sub-division seventh, of Section 253, page 83, of the code of Civil Procedure, of the Territory, provides "If any party to the trial desires to except to any instruction given by the Court, or to the refusal of the Court to give an instruction asked for, or any modification thereof, he shall reduce such exception to writing and file the same with the clerk before the cause is submitted to the jury."

Section 283, page 92, code of Civil Procedure of Montana Territory, is as follows: "No particular form of exception shall be required. The objection shall be stated, with so much of the ev-

idence, or other matter, as is necessary to explain it, but no more, and the whole as briefly as possible."

The exceptions to the instructions given by the Court, and to the refusal of the Court to give those requested by plaintiffs in error, will be found on record pages 26 and 27.

The exception to the refusal of the Court to give those requested by the plaintiffs in error, as shown by the "bill of exceptions," on page 26 of the record, is as follows:

"And the said defendants having requested the Court to give instructions Nos. 1, 3, 4, 13 and 14, as offered by them, but the Court considering that the said instructions did not accurately and correctly state the law, refused to give the same, to which refusal defendants *then and there duly excepted.* And there being no evidence before the jury tending to show that the defendants, Greenhood, Bohn, Heckman or Cohn, had directed the Sheriff to levy upon the particular property in question, said defendants asked the Court to instruct the jury as requested and expressed in instruction No. 11, and the Court not considering that said instruction correctly stated the law as applicable to this case, refused to give the same, to *which refusal defendants then and there duly excepted.*"

The instructions thus requested by plaintiffs in error, and refused by the Court, appear on pages 17, 18, 19 and 20 of the record.

By reference to bill of exceptions contained on pages 20 and 21 of record, the objections and exceptions therein stated will appear to have been *then and there duly excepted to.*

Section 816, page 191, of the code of Civil Procedure of the Territory, is as follows: "All bills of exceptions shall be reduced to form unless noted by the Clerk and signed during the the term at which the same is tried." * * * *

The reasons of the Court below in not considering the objections to these instructions, because it did not appear from the Bill of Exceptions "that the exception was reduced to writing and filed with the clerk before the cause was submitted to the jury," we respectfully submit cannot be maintained. The question presented is not one of practice, but one of construction and effect to be given to the language used in the Bill of Exceptions signed by the Court trying the case. The Bill of Exceptions so signed by the Court states as a fact that the objections were made, and that the exceptions were *then and there duly taken* in some instances and in others to which *defendant then and there duly excepted.* Plaintiffs, in error contend that as the statute requires the

exception to be filed with the clerk before the cause is submitted to the jury, the language used by the Court necessarily implies that it was done. It is claimed that this Bill of Exceptions should recite the fact that such exceptions were so filed. We submit that the expressions used by the Court is tantamount to such statement, and will admit of no other construction. It cannot be said that the exception was then *and there duly taken* unless the same was so filed with the clerk.

If this was language used by counsel in a pleading there might be reasons for making it more specific upon a motion from the opposing party for that purpose. Upon such motion it could be corrected in this respect.

Eminating, however, as this does from the court, we do not think it subject to the same objection. In the one case it would be a conclusion drawn by the pleader, and in the other a statement which is peculiarly within the province of a court to make from the facts before it. If no objection is made to a pleading, when conclusions are thus stated, it is deemed waived, and is not considered such a defect as would invalidate it. So we think it should be, if the language used by the Court is to receive the same interpretation. Defendants in error did not make this objection to the Court signing the bill of exceptions; did not seek to

modify or change the language, or require a copy of the exceptions to be inserted in lieu of it, and it is certainly too late. The opportunity to correct it has passed, and it must consequently receive such construction as the law, under these circumstances, places upon it. Upon questions similar to the one presented, in the case of Simpson & Co., vs. Dale, 3d Wallace, pages 473 and 474, Mr. Justice Davis says: "It is contended by defendants in error that the rulings of the circuit court, which are alleged to be erroneous, were not saved during the progress of the trial, and cannot, therefore be investigated here. If this was so it would be fatal; but we do not *thus* interpret the record. It is well settled that bills of exceptions are restricted to matters which accrued during the progress of the trial; but it is not necessary, neither is it the practice, to reduce to form every exception as it is taken, and before the trial is at an end. It will do for the Judge to note them as they occur, and after the trial is over; and after the trial if it is desirable to preserve them they can be properly embodied in a bill of exceptions. In this case the bill of exceptions is unskillfully drawn, and is justly subject to criticism; but it clearly appears that the rulings of the Circuit Court which are sought to be reviewed here, were excepted to in proper

time, and when the cause was on trial and not afterwards. If this is so we cannot allow a valuable right to be defeated because the Judge carelessly used a word in the present tense, when the true expression of his meaning requierd the use of the word in the past tense. It is a fair inference from the bill of exceptions * * * that they also excepted, before the jury retired from the bar, to each of the series of instructions, which the Court gave the jury. The bill of exceptions is, therefore, valid, and brings to our notice the proceedings of the Circuit Court it is asserted are erroneous."

Under this opinion it appears that it was the duty of the Judge to note the exceptions at the time in his minutes and afterwards reduce them to proper form by Bill of Exceptions. Under the statutes of the Territory, heretofore quoted, it was the duty of the attorney to file his exceptions with the clerk before the case is submitted, and signed during the term. The Court, in the opinion just quoted, *construes* the Bill of Exceptions in *accordance* with the *true expression* of its *meaning* and the *fair inference gathered* from it. While we do not admit that the statute contemplates incorporating into a Bill of Exceptions a copy of those filed with the clerk. It was not considered necessary in that case that it should appear in the

bill of exceptions; that the Judge wrote down the exceptions at the time in his minutes and afterwards reduced them to form, nor do we think, under our statute, it should state that they were filed with the clerk and afterwards reduced to form. Yet, if it *was* necessary to be done, it will be assumed that such is the case in the one under consideration. The statute permitting it to be afterwards *reduced to form and signed* would seem clearly to indicate to the contrary, and that it is all sufficient if the objections appear and the exception was taken at the proper *time* and *place*. Upon the construction, however, to be given the words used in the Bill of Exceptions, "*then and there duly excepted*," we call the attention of the Court to the following authorities:

Burrill's Law Dictionary, page 524. "Duly; in due or proper form or manner." "Regularly; upon a proper foundation, as distinguished from mere form."

It will be assumed that the exception mentioned was presented to the Judge, and in reducing the Bill of Exception to form, he considered those filed with the clerk as the foundation upon which he used the expression, "then and there duly excepted." The substance of the thing, formed by the Court from the records, and reduced to form,

is all that is required in the Bill of Exceptions.

State vs Fay, 43 Iowa, p. 651

In Regina vs. Inhabitants of Kughley, 55th Eng. Com. Law Report, 876, on page 881, Denman, Ch. J., says: "I think that the words '*duly stamped*' would imply not only the amount, but the time of stamping, in cases where time is essential;" and in the same case, Williams, J.: "The examinations sent by the respondents allege that the instrument was 'duly stamped.' What that means may be at once ascertained by reference to the stamp act." And so we say in this case, what the Court means in the Bill of Exceptions by the words "defendants then and there duly excepted," can be readily ascertained by reference to the code of Civil Procedure upon that subject, which we have heretofore quoted. See also Bowen vs. Darby, 14th Florida, 202; 23d Barbour, 304 and 305; and i. d. 23d Barbour, 143–151.

The Court held on demurr, that the allegation that a policy of insurance was duly assigned implied that it was in writing and by a sealed instrument when such was required. The same rule of construction applied to the case at bar would imply that the exception was in writing and filed with the clerk.

Besides, in regular order after the instructions

were given, comes the exceptions referred to on page 26. See record, also p. 20. It will appear that in some places the words used are defendant "likewise object," and in others "defendants objected," and then and there duly excepted. In fact the Bill of Exceptions clearly show that the objections to the instructions were specifically pointed out, more than was required by the code, and that exceptions were then and there duly taken, i. e., at the very time they were given or refused. In McCreery vs. Everding, 44th California, 249. This Court, through Mr. Belcher, J., say: "In Bozeman vs. Cudworth, 39 California, 150, the record stated: To which charge and each part thereof plaintiff duly excepted." And this was held to be sufficient on the ground that counsel having agreed to the statement, agreed that plaintiff "duly excepted," and there was no necessity of stating the specific mode in which the exceptions were taken. That case is authority upon the point in hand, and we are satisfied with the rule there laid down." A like principle would certainly apply when no objection or amendment was offered by Counsel and the Court settles and signs the Bill of Exceptions, in which it states that the exception was "then and there duly taken." Taking it then that these objections will be considered upon this trial, we respectfully

submit that the record on pages 20, 21, 26 and 27 disclose errors in the instructions which are fatal.

The Statutes of Frauds of the Territory among other things provide as follows:

"Section 169," page 436: "Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by the immediate delivery and followed by an actual and continued change of possession of the thing sold and assigned, shall be conclusive evidence of fraud as against the creditors of the vendor of the person making such assignment or subsequent purchasers in good faith."

That plaintiffs in error were creditors of Black & Daniels, the vendors, and recovered judgment on their demand for the sum of eighteen hundred and thirty-six dollars and ninety-eight cents, is averred in the answer and is not denied in the replication, and elsewhere appears in the record. See record, pages 3 and 5, and that the Statute of Frauds was properly pleaded. See also record, page 4.

"That there was evidence introduced to show that plaintiff had been clerking for Black & Daniels since they commenced business, and was so clerking for him at the time of their sale to him in their place of business. That their sign was

up as it it had been theretofore, when the attachment was levied, and that their said sign of Black & Daniels was on the curtains of the windows of said building, and that the plaintiff was carrying on business in said building, and that the goods levied upon were in said building at the time of the levy." See record, bottom of page 13, and that Daniels, one of the firm, was still rooming in said store, and was in the same at the time of the levy. See top of page 26 of record.

By instruction 5, page 15, of the record, the Court gave the jury the law applicable under the statute quoted; but by instruction No. 5, given at the instance of defendants in error, the Court entirely destroyed the effect of it by saying to the jury: "If the defendant had actual notice of the sale of said goods by Black and Daniels, to the plaintiff, the fact that there was no change in the sign or curtains formerly used by Black & Daniels in the store when said goods were attached by the defendant, and the Sheriff of Gallatin County, cannot be *deemed evidence* that plaintiff did not possess said goods as against any claim of defendants in their action against said firm.

See record, page 17.

The Court having refused all the instructions offered by defendants except No. 10, record page 19, and especially Nos. 1, 2 and 3, upon the sub-

ject requested, as appear on record bottom of page 17 and top of page 18, the jury were left upon this question with nothing to guide them except said instruction No. 5, as to what evidence could be considered in determining whether there was such a delivery of possession and continuous change thereof as the law requires. The objection pointed out to said instruction No. 5, above quoted, and which by clerical error is numbered 3 in the record, and so referred to in the opinion of the Court below, and to which exception was taken at the time, will be found on record, page 21, and is as follows:

"And the defendants objected to the 3d (i. e. 5) instruction requested by the plaintiff, for that the same made *actual notice* to the defendants of the sale dispense with the necessity of the delivery of possession, and renders the usual evidences thereof unnecessary, and tells the jury in such case to disregard the signs of the vendors up, and on the windows used by them, even though there at the time of the attachment, is the only instruction upon the subject; utterly ignores evidence upon which a fraud in law is established, and renders inoperative this defense by reason of the notice of the sale * * and the said objection was overruled, and to which ruling defendants then and there excepted."

See record, page 21, and bottom of page 26.

That the evidence referred to is competent and was proper to be considered, under the statute we have quoted, as substantial facts tending to show that there was no such change of possession as is required, and that notice of such sale does not supply the necessity of such facts. We refer to the following authorities under a similar statute:

Claflin vs. Rosenburg, 42d Missouri 439; Hurlburd et al vs. Bogardus, 10 California 518. In some States the failure to deliver possession is only prima facia evidence of fraud, but this Court in commenting upon the decision of the Supreme Court of the State of Missouri upon a like statute, speaking through Mr. Justice Field, in Allen vs. Massey, 17th Wallace, 333 and 354, says: "There was no outward sign manifested nor indication exhibited nor notice given which could apprise the community of any change of ownership." * * In order to render the sale valid under the statute the possession which the purchaser of the property sold was required to take, must be open, notorious and unequivocal, such as would inform the public or those accustomed to deal with the party, that the property had changed hands and that the title had passed from the vendor to the purchaser. Observing at the same time that a

possession of this kind excluded the idea of a joint or concurrent possession with the vendor." This would certainly apply with much more force, and render the instruction given in this case much more erroneous, when it is considered that the alleged sale in this instance was to a clerk, who had been engaged as such in the *same business*, and in the *same house* and by the *same firm* since they embarked in business.

And such, as far as we are able to discover, is the uniform tenor of the decisions of these States, where the bonafides of the transactions are of no avail, when this character of possession does not immediately follow the sale. To hold that a stock of goods sold to a clerk in the house, who had been such ever since their business started, using the same sign, also same sign on window curtains, with one of the old firm occupying the same building, was not some evidence that such a change of possession as that required under the statute, would dispense with the most usual and ordinary mode, by which it is made *open*, *unequivocal* and notorious. The force and effect of this statute cannot be evaded by a simple inquiry into whether a creditor had seen a notice of the sale in some newspaper, or establishing even that a valuable consideration had been paid for it. While conflicting instructious upon material matters will

work a reversal of a case, it will generally be conceded that an instruction in express terms taking from the jury the *evidence* upon which conclusions of abstract principles of law are reached, are likely to have a greater influence in its operations than enunciation of those principles in the abstract. It is like saying to an individual that it is his duty to be diligent in observing approaching danger, but that he is not at liberty to use his senses in discovering it. The instruction would probably be applicable under the statute if plaintiffs in error claimed as bonafide purchasers. In such case actual notice might be sufficient to satisfy this requirement of the statute without an actual, immediate and continuous change of possession, the sale in all other respects being made in good faith. In the one case the purchaser himself must act in *good faith* to receive the benefits of the statute. In the other it is the right of a creditor under the statute to take the advantage of the failure to have actual, open and unequivocal possession delivered of the property sold.

Without going through all the errors assigned upon the giving or refusing instructions, we call attention generally to pages 20, 21, 26 and 27, when the objections made at the time appear at large in the records. From these it will be seen

that there are many other errors equally as fatal as the one heretofore discussed. The cause of action presented by the complaint in this case is one of claim and delivery under the code. No affidavit and undertaking having been made so as to authorize a return of the property it took the qualities of an action for conversion, and the evidence of the defendants in error was confined to the value of the goods at the time they were levied upon, and while being sold by Clarke, the auctioneer. The answer shows that plaintiffs in error sued out a writ of attachment against the property of Black & Daniels, and that the *Sheriff* in *pursuance* of *it* made the *levy* upon the goods in question. It shows that plaintiffs in error in no wise participated in the alleged trespass, the seizure complained of, and that the process they procured ran against the property of the defendants in *that* action, Black & Daniels. During the trial certain papers were called for in the case for the purpose of connecting the plaintiffs in that action with the alleged wrongful taking of the goods. Plaintiffs in error knowing just what those papers would show, and all that they could show, made the admissions contained in the amendments of defendants in error found on pages 32 and 33 of the record, which is also incorporated in the engrossed Bill of Exceptions, so to call it.

at bottom of page 12 and top of page 13 of record. We quote it below that it may be seen just what the admissions of record entered was:

"Thereupon the plaintiff requested of the Clerk of this Court the *writ* of *attachment* and *Sheriff's return* thereon in an action commenced in said Court about the 14th day of May, 1878, wherein said defendants, Greenhood, Bohm, Hickman & Cohen, were plaintiffs, and Black & Daniels were defendants, for the purpose of showing to the jury that the Sheriff of said County, on said 14th day of May, 1878, *at the request* and *instance of said defendants, Greenhood, Bohm, Hickman & Cohen*, had in said above mentioned action attached the goods of plaintiff mentioned in Exhibit 'A,' attached to the complaint herein, as the property of said Black & Daniels, and the Clerk informed the Court that after diligent search the papers could not be found. Thereupon counsel for defendant *admitted that* the property mentioned in list marked 'A,' and attached to plaintiffs' complaint herein, *had been attached* by *said Sheriff*, in said action, wherein Greenhood, Bohm, Hickman & Cohen were plaintiffs and said Black & Daniels were defendants. As the property of said Black & Daniels, and that after judgment was obtained said action, said property, had on the 16th day of December, 1868, been sold by the Sheriff of said

County, by virtue of a writ of execution issued by the Clerk of said Court in said action." So it will be seen that plaintiffs in error admitted precisely the same facts set up in their answer, that is, that the property was *attached* by the *Sheriff* on process issued against the property of Black & Daniels, the defendants in the suit, in which such process issued. Counsel for defendants in error considered this sufficient to make them liable. That plaintiffs in error, Greenhood, Bohm, Hickman & Cohen, could deny defendant in error title to the property, deny the trespass, and at the same time show that their co-plaintiffs in error the Sheriff alone was liable, in that he levied the process on these goods under a writ of attachment against the property of Black & Daniels. We quote Section 89 page 57 of the Code of Civil Procedure of Montana.

"The defendants may set forth, by answer, as many defenses and counter claims as he may have; they shall each be separately stated, and the several defenses shall refer to the cause of action they are intended to answer, in a manner by which they may be intelligibly distinguished."

Under this state of pleadings and facts plaintiff requested instruction No. 11, page 19 of record, which is as follows: "Unless it is shown to you

by the evidence introduced in the case that Greenhood, Bohm & Co. ordered, or directed the Sheriff to levy upon the goods in question, of course you cannot find judgment against them in this action."

By reference to bill of exceptions, record page, 21, the following will appear: "Defendants asked the Court to instruct the jury as requested and expressed in instruction No. 11, so offered by said defendants, and the Court not considering that said instruction stated the law correctly, as applicable to this cause, refused to give the same, to which the defendants *then and there duly excepted.*"

So it was the issue was presented by the pleadings, treated as presented, proof offered to support it on the part of the defendant in error, and under the admission Greenhood, Bohm & Co. had a right to have the instruction given, if law, and could not have contemplated verdict, under any circumstances against them. That this instruction presented the law, we refer to the following authorities, which will be found in point: Allen vs. Crary, 10th Wend., 349; Acker vs. Campbell, 23d Wend., 272; Marsh vs. Backus, 16th Barb., 483.

We also call attention of the Court to the instructions requested by plaintiffs in error, as a

whole; that they present the law applicable to the case, and by being refused the real merits of the controversy was not fairly presented to the jury.

We respectfully invite the attention of the Court to the errors committed in the rejection and admission of evidence, which are specifically pointed out in the record, an examination of which here would extend this brief to undue limits.

As plaintiffs in error interested, submitting this case without oral argument, we have already entered more into detail of the questions presented than we otherwise would have done.

E. W. TOOLE,

Attorney for Plaintiffs in Error.

111-775

In Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 314.

ISAAC GREENHOOD et al.,

vs.

WILLIAM RANDALL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

BRIEF FOR THE APPELLEE,

BY

SHELLABARGER & WILSON.

WASHINGTON, D. C.:
C. W. BROWN, PRINTER, 923 F STREET, NORTHWEST.
1884.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

BRIEF FOR THE APPELLEE, RANDALL.

We have delayed the preparation of this brief until within three days of the time when the clerk estimated that the case would be reached, in order to have the benefit, in its preparation, of the assignment of errors and the brief of the appellants; and we now prepare this brief without such opportunity to inspect the opposing brief; none such being yet on file. The record is in such a state of inextricable confusion as to render the preparation of a brief difficult, if not impossible.

The following defects in it are suggested and presented for the consideration of the Court:

First. That there is no authentication of this record such as is contemplated by the law and the rules. The certificate of the clerk is simply that "the foregoing 128 pages contain "a full, true, and correct transcript of *certain* pleadings,

"records and proceedings made and had in the above-enti-
"tled case, as the same remain on file and of record in my
"office." The defect of it is that it does not certify that it is a full record in the case, but only that it is a record of "certain" pleadings, etc. We infer from the Court's opinion that there was an assignment of errors in Supreme Court. None is in this record.

Second. There is no record of the proceedings in the case, in the Court of first instance, at all, except what is embodied in a supposed bill of exceptions, beginning on page 1; and in this bill of exceptions are jumbled together in chaos the pleadings in the case, the amendments of pleadings, the motion of the defendants for a judgment on the pleadings (R., 6,) the overruling of that motion, exceptions to the overruling, leave to file appellants' amended answer, leave to file amendment of replication; these followed by mingling with them the bulk of the testimony of the plaintiff, the bill of sale by Black and Daniels to Randall (R., 7,) the publication of notice of sale to appellee, &c., &c.—much of which matter, so put into the record, it will be seen, has no material relation to the exceptions attempted to be preserved, and which throws no light on the exceptions.

Third. It then sets forth all the instruction asked by the plaintiff (R., 16 and 17,) *but does not show whether the instructions asked by the plaintiff were given or refused*, except as to the first instruction (R., 16,) shown to have been "given." It then sets forth the instructions asked for the defendants, but *does not show whether any of these were given or refused;* nor what was done with them. It then shows that the defendants objected to the instructions given by the Court, on its own motion, *as a whole*, but does not state (R., 20,) why the *whole* was objected to; nor what, if any part was meant by this wholesale objection. It then proceeds to state an objection to the *entire mass* of instructions asked by the plaintiff (fol. 52;) and gives as the reason therefore that the same based the validity of the sale upon the *bona fides* of the parties and ignored the "statutory fraud." It then states

an objection to the overruling of this exception in mass to the *body* of the instructions asked for the plaintiff. It then proceeds to note objections, in detail, to the instructions of the Court, some of which we will notice hereafter (R., 20 and 21.)

It then gives the verdict of the jury. (R. 22, 23.)

Then, on page 23, begins what purports to be a "bill of exceptions, No. 2." This bill of exceptions attempts to incorporate into itself, and for a second time, *all the proceedings in the case*, including all the pleadings from beginning to end; but does so by referring back to pages in blank———. It in no case gives the actual page of the transcript, or record; all being in blank. It thus attempts to repeat, a second time, the same exceptions noted in the former supposed bill of exceptions, this by referring back to the former bill of exceptions, but giving, in no case, the *actual* page, but all references to pages being left in blank.

It is often impossible to get from this record the point of the various exceptions. For example, (R. 24), it is said that Daniels, one of the vendors, "being duly sworn, was interrogated by the plaintiff, as follows, to wit, which see——— pages *ante*." But, the page being blank, you cannot tell what page, or interrogatory, is referred to. When you turn to his evidence, for the purpose of getting this interrogatory put to Daniels, (R., 10), you find *several* interrogatories, and also several exceptions, and you cannot tell *which* is referred to. The same is, in substance, true in regard to exceptions taken to Black's evidence, (R. 10 and 11). This trouble extends throughout all the exceptions taken regarding the introduction, or exclusion, of evidence.

Then, when you come to the statement in this second bill of exceptions, regarding the charge to the jury, (R. 26), it says that "the following instructions were given by the "Court on its own motion, and the following instructions "given and refused, which were offered by the plaintiff, and "the following instructions were offered by defendants and

"given, and modified, and given as modified, and referred to, "to wit." Then follows these words:

"Here insert all of said instructions offered by both parties, and those given by the Court on its own motion, as numbered, showing which were given, which refused, and which modified, and in what respect modified.

"Which see at pages ——— ante."

Then follows this (R. 26):

"And the said defendants objected to the instructions, *as a whole*, as given by the Court on its motion and upon the motion of the plaintiff, which see at pages———ante."

But if you refer back in your attempt to find what instructions "were given," and what were "refused," and what "modified," of those asked by the two parties, you find *nothing* in the record showing what was "given," or what "refused," or which "modified," except those given on the Court's own motion; and except, also, request No. 1 by the plaintiff. (R. 16.)

Then follows an enumeration of special requests for instructions (R. 26 and 27), to some of which we will allude hereafter.

Then this second bill of exceptions is signed by Judge Conger, p. 27.

Then follows the appeal to the Supreme Court of the Territory.

Then follows (R. 29) plaintiff's amendment to defendants' bill of exception No. 2. These amendments are very numerous, and it is impossible, for the counsel for the appellees, to incorporate these *amendments* of the second bill of exceptions into that second bill. This second bill of exceptions is in utter confusion, even when taken by itself. But when you come to attempt to incorporate the amendments which are specified on pages 29, 30, 31, 32, 33 of record, we find such incorporation beyond our skill. There is not that in the record which enables us to insert the *amendments* to bill of exception No. 2. Take as a specimen of the whole, (R. p. 33), where the Court directs to

"Amend by striking out the words 'and that,' on line——, page——, and all of lines——, and the words, 'be paid by plaintiff,' in line——, on said page——, for the reason there was not evidence of that character."

Or take another specimen on same page (R., 33.)

"Amend by striking out all of lines —— and words in "question, on line —, on page —, for the reason that here-"inbefore these amendments show," etc.

What lines are to be stricken out we have found no means of determining.

This confusion, doubly confounded, was, however, not enough. Record, pp. 34 and 35, an amendment of the record is ordered, under a suggestion of diminution, by appellants. Thereupon the court overruled the motion for correcting the transcript; and then, on inspection, the court find that the case ought to be heard upon a bill of exceptions contained on pages 1 to 62, etc., etc., and also that certain pages from 63 to 73, inclusive, and pages 79 to 91 were improperly in the transcript and should be stricken out.

But where the various lines and pages of the original MSS. bill of exceptions are to be found in the record in this court, we know not.

These are but a part of the confusions in this record; and they have been thus pointed out for the single purpose of basing upon them the motion to refuse to review this record and to affirm the judgment.

This Court has often refused to attempt a review of records far less confused than this. Indeed, we doubt whether it is possible to find in this record what is essential to any review of the case. See such cases as—

Lincoln *vs.* Clafflin, 7 Wall., 136.
Beckwith *vs.* Bean, 98 U. S., R. 284, and cases cited.

Brief.

We proceed to state, as well as we can, some exceptions attempted in this record. And first there is no question here presented upon which this Court can pass in regard to

the instructions given and the instructions refused by the Court to the jury, because the bill of exceptions does not show what is expressly required by the statute, to wit, that any exception to the instructions asked or refused was reduced to writing and filed with the clerk before the cause was submitted to the jury. Section 253 of the code of civil procedure of Montana require this. It says:

"If any party to the trial desires to except to any instructions given by the Court, or to the refusal of the Court to give instructions asked for, or any modification thereof, he shall reduce such exceptions to writing and file the same with the clerk before the cause is submitted to the jury."

This was not done, and upon this point the Supreme Court of the Territory says (R., 47):

"This section contemplates that the exception to the instruction shall be reduced to writing in a bill of exception, (which, of course, must be signed by the judge) and filed with the clerk before the cause is submitted to the jury.

"Not one of the exceptions to the instructions as shown by the record complies with these requirements. The mere statement in the record that the Court was asked to give certain designated instructions which were refused and an exception taken, or that the plaintiff objected to the giving of certain instructions that were afterwards given, to the giving of which the party objecting excepted, without reducing such exception to writing and filing the same with the clerk, is in compliance with this section of the code, and this Court will follow the decisions of the Supreme Court of the territory in the matter of construing their practice act."

And this presentation of the exceptions to the charge, by filing with the clerk *before the case is submitted to the jury*, is not only an express requirement of the Montana code, but is a vital rule of correct practice and so held by this Court in such cases as—

Phelps *vs.* Myers, 15 Howard, 160.

Therefore, in regard to all instructions given to the jury or refused, they are not of the case. But if you could consider the instructions *so far as* that consideration depends

upon the filing of exceptions with the clerk, still there are other objections to their consideration. For example, take the instructions given by the Court on its own motion. As to these the exception (R., 20) is that the instructions were excepted to *as a whole*. But this is no good exception. This is exceedingly familiar law.

Camden *vs.* Doremus, 5 Howard, 515.

So also as to the exception taken to the Court's refusal to give the instructions asked by appellants, Nos. 1, 3, 4, 13 and 14, the exception attempted to be preserved is to the Court's refusal to charge these *as a mass*, (R., 26.) If any one of the mass was not good, as clearly at least some were, (see 14th R., 20,) then the refusal to give the mass was not error.

Johnson *vs.* Jones, 1 Black, 209.
Rogers *vs.* Marshall, 1 Wall., 644.
Harvey *vs.* Tyler, 2 Wall., 328.
Burton *vs.* Driggs, 20 Wall., 133.
Belk *vs.* Meagher, 104 U. S. R., 279–289.

We now turn to some of the more specifically expressed exceptions, as disclosed by the bills of exceptions. It will be noticed that there is in this record no assignment of errors made in the Supreme Court of the territory.

It is impossible, therefore, for us to tell what will be relied on in this Court, in the absence of an assignment of errors below, and in the absence of any brief or assignment of errors by the plaintiff in *this* Court, showing upon what the plaintiffs will here rely. Hence we will, for the purposes of this brief, assume that the reliance will here be upon the *same* matters relied upon in the Court below, as that reliance is expressed in the opinion of the Court below. (R. 41.)

The Court there comments upon *all* that was relied upon in the Court below.

The first, error so relied upon, relates to an exception, by plaintiffs, to the leave granted to amend the replication. (R. 24.)

The exception does not state what it was based on, and therefore, if it can be considered at all, (as it cannot, 20 Wall., 33; 104 U. S. R., 289), it presents no other question than whether pleadings may *ever*, under leave of the Court, be amended. This is expressly authorized by the code of Montana and is settled by their decisions. (1 Montana, 627; 2 Montana, 415.)

The next exception relied upon below seems to have been that mentioned, R. 9, fol. 22, to the question asking Randall whether he went into immediate possession and continued so.

It appears, by the opinion of the Court, (fol. 111), that in the Supreme Court below the leading quality of this question was not insisted upon as an objection. What other objection there is to it it seems difficult to imagine. It is a question, simply asking about the palpable physical fact—was possession taken, and taken at once? We adopt, as part of our argument, what the Court says regarding this (R. 42).

Was possession taken immediately is not asking a question of law, but one of fact purely.

The next objection relied on below seems to have been in refusing to allow Daniels to be asked what was done with Randall's note. (R. 10).

Touching the ruling excluding this question, the Court below says (R. 43.)

"The purpose of the inquiry is not disclosed in the record. We have no means of knowing what the appellants propose to prove by making the inquiry. * * * The appellants ought to have stated, and placed in the record, what they proposed to prove, then this court could have passed upon its competency. But if, by the question and the answer sought, the appellants proposed to prove that the execution of the note was a sham and fraudulant, were they injured by the action of the Court in sustaining the objection to the question? Evidently not. For when they came to present their case to the jury, they might have placed Daniels on the stand, and asked him in precisely the same words the question they had asked him upon cross-examina-

tion. Making the witness their own would not have forfeited any of the advantages a cross-examination gave them in such a case, where the inquiry on cross-examination would have been competent upon an examination by them in chief."

It seems to us that this reasoning of the Court is right. The particular attention of the trial court should have been directed to the matter sought for in the answer; and this exception comes within the reasons of such cases as Lovell *vs.* Davis, 101 U. S., 541; Nailor *vs.* Williams, 8 Wall., 107.

Not only is this exception within the reasons of the last cited cases, but it is one ruled by the decisions of this Court holding that the record must specifically and affirmatively show what point the excluded evidence was directed to, and thus establish its materiality.

In Belk *vs.* Meagher, 104 U. S. R., 290, where the location of a boundary was in issue, one party was excluded from the answer, by the surveyor, to the question whether *any one* (the adversary for example) had pointed out that boundary. This Court held the question "*too general*," and held its exclusion no error. So here, to make this exception available, the record should show *something* as to what was sought for in the answer and its materiality.

The next exception relied on in the Supreme Court seems to have been that stated on page 25 of the record, where the Court excluded, over appellants exceptions, evidence offered by them to show the *prices* realized for the goods at sheriff's sale.

This was properly excluded for two reasons; first, that the plaintiff was entitled to the value of the goods *at the time of the attachment*, and was not confined to their value at the time of the sheriff's sale; and, second, because they could not prove the value of the goods by showing what they brought at sheriff's sale.

McCracken *vs.* West, 17 O. R., 24.
Elvin *vs.* Bullard, 35 Vt., 268.
Anderson *vs.* Knox, 20 Ala., 156.
Davis *vs.* R. R. Co., 11 Mass., 506.

The next exception relied upon in the Supreme Court seems to have been instruction number five, given at the instance of respondent (R., p. 43, bottom.) This exception and all others relating to the charge to the jury are disposed of by the fact that they were not reduced to writing and filed with the clerk before the case was submitted to the jury, and in this brief we will not further comment upon instructions given to the jury.

The only other exception which seems to have been relied upon in the Supreme Court, is the one in regard to the allowance of interest. This exception was sustained in the Supreme Court, and the interest was by the Supreme Court deducted, hence this exception is out of the case.

For the reasons above given, growing out of the bad condition of this record, and the fact that no brief or assignment of errors, in either Court, has been filed by the plaintiff in error, up to this 5th day of April, 1884, we have found it impossible to make any satisfactory examination and presentation of this case, and, hence, we leave any further argument, which may be required of us, for oral presentation.

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